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In the
Supreme Court of the United States

COLLEGE STANDARD MAGAZINE, JEFFREY SCOTT BAREA, and JULIEN A.M. STARR,
Petitioners,

v.

STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK AT ALBANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Second Circuit erred in holding, in harmony with the Sixth Circuit but in conflict with decisions of the Third, Fourth, Fifth, Eighth, and Ninth Circuits, that a request for or award of nominal damages does not prevent a case from becoming moot?

RULE 29.6 STATEMENT

Petitioners Jeffrey Scott Barea and Julien A.M. Barr are individuals.

Petitioner College Standard Magazine is an unincorporated association.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND POLICY 2

PRELIMINARY STATEMENT 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. THE COURTS OF APPEALS HAVE BECOME DEEPLY DIVIDED OVER WHETHER THE AVAILABILITY OF NOMINAL DAMAGES PREVENTS A CASE FROM BECOMING MOOT WHEN DURING THE LITIGATION THE GOVERNMENT REPEALS OR REPLACES THE CHALLENGED POLICY AND THIS DIVISION HAS IMPORTANT CONSEQUENCES TO CIVIL RIGHTS PLAINTIFFS AND GOVERNMENT DEFENDANTS. 7

A. The majority of the Courts of Appeals have held in essence that the repeal or replacement of an unconstitutional law does not erase the slate and the award of nominal damages holds defendants

responsible for their past unlawful action — two Circuits, the Sixth and now the Second have departed from this growing consensus 9

B. Until the issue is resolved, parties (in circuits that have wrongly decided the issue) are being forced unjustly to bear risks and costs of litigation that they should not. 12

C. The minority side of the circuit split has a particularly pernicious effect upon free speech cases like this one where the government possesses unbridled discretion to determine access to a forum. ... 15

D. In the decade since this Court's decision in *Buckhannon* the question whether nominal damages prevent a case from becoming moot, where the government has changed or repealed an alleged unconstitutional policy, has come strikingly to the fore 16

CONCLUSION 18

APPENDIX

Opinion of the U.S. Court of Appeals for the Second Circuit (July 1, 2010) 1a

Decision of the U.S. District Court for the Northern District of New York (August 8, 2005) (Excerpt of Transcript Proceedings containing decision.) 9a

Amended Decision of the U.S. District Court for the Northern District of New York (February 6, 2007) 14a

Decision of the U.S. District Court for the Northern District of New York (October 18, 2006) 16a

Order denying Appellee's Petition for Rehearing *en banc* of the U.S. Court of Appeals for the Second Circuit (September 20, 2010) 18a

TABLE OF AUTHORITIES

CASES:

Advantage Media, LLC v. City of Eden Prairie,
456 F.3d 793 (8th Cir.2006).....6, 11

Bernhardt v. County of Los Angeles,
279 F.3d 862 (9th Cir. 2002) 10

Beta Upsilon Chi Upsilon Chapter at the University of Florida v. Machen,
586 F.3d 908 (11th Cir. 2009).....14

Board of Regents of University of Wisconsin System v. Southworth,
529 U.S. 217 (2000).....3

Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,
532 U.S. 598 (2001).....16-18

Burns v. PA Dept. of Correction,
544 F.3d 279 (3rd Cir. 2008) 6, 11, 18

Carey v. Piphus,
435 U.S. 247 (1978).....7-8, 13

City of Lakewood v. Plain Dealer Publishing Co.,
486 U.S. 750 (1988).....15

College Standard Magazine v. Student Association of the State of University of New York at Albany,
610 F.3d 33 (2nd Cir. 2010).....1, 18

Covenant Media of SC, LLC v. City of North Charleston,
493 F.3d 421 (4th Cir. 2007).....6, 11, 18

Forsyth County, Ga. v. Nationalist Movement,
505 U.S. 123 (1992).....15

Freedom From Religion Foundation, Inc. v. City of Green Bay,
581 F.Supp.2d 1019 (E.D. Wis. 2008) ...6, 8, 11-12

Jacobs v. Clark County School District,
526 F.3d 419 (9th Cir. 2008).....6, 10

Memphis Community School Dist. v. Stachura,
477 U.S. 299 (1986).....8, 13

Morgan v. Plano Independent School Dist.,
589 F.3d 740 (5th Cir. 2009).....6, 9, 18

Morrison v. Board of Educ. of Boyd County,
521 F.3d 602 (6th Cir. 2008) 6, 11-12

Thomas v. Chicago Park Dist.,
534 U.S. 316 (2002).....15

Utah Animal Rights Coalition v. Salt Lake City Corp.,
371 F.3d 1248 (10th Cir. 2004).....6, 8, 10-12, 18

INTRODUCTION

Petitioners brought an action challenging the Student Association of the State University of New York at Albany's ("SA") viewpoint discriminatory allocation of student activity funding to student organizations. During the litigation in the district court, the SA changed its policy. Nevertheless, the district court granted summary judgment to petitioners on their facial challenge to the old policy and awarded them each nominal damages. In light of the changed policy, the Second Circuit vacated the judgment of the district court as moot despite petitioners' obtaining of nominal damages. The Second Circuit's decision conflicts with the majority of the other Courts of Appeals that have decided the issue of whether the award of nominal damages prevents a case from becoming moot when the government repeals or replaces the challenged law.

OPINIONS BELOW

The Second Circuit's opinion is reported as *College Standard Magazine v. Student Association of the State University of New York at Albany*, 610 F.3d 33 (2nd Cir. 2010) and appears in Appendix ("A.") at 1a – 8a. The opinion of the United States District Court for the Northern District of New York (McAvoy, J.) is unreported and a transcript of the Court's oral decision appears at Appendix ("A.") at 9a – 13a.

STATEMENT OF JURISDICTION

The petitioners seek review of the decision of the Second Circuit Court of Appeals rendered on July 1, 2010. A. at 1a. The Second Circuit denied petitioners' timely petition for rehearing and rehearing en banc on September 20, 2010. A. at 18a-19a. The mandate issued on September 25, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICY

The United States Constitution Art. III, Sec. 2 provides in pertinent part: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ... ."

PRELIMINARY STATEMENT

Scott Barea, Julien Starr, and College Standard Magazine won their case in the district court and were awarded nominal damages. A. at 13a. On cross-motions for summary judgment, the district court found that defendant required petitioners to give their money to the Student Association ("SA"), which then distributed it to other groups in a facially unconstitutional manner. A. at 9a-13a. In particular, the district court found that the SA's policy allowed it to deny a student group funding for any reason including reasons having to do with the popularity of the group with other students. A. at 11a. The SA appealed the district court's

determination that their policy had violated the First Amendment. *Cf.* A. at 5a.

On appeal, the Second Circuit vacated the judgment as moot. The circuit court found that the SA had changed its policy (before the decision on summary judgment), found that the SA was unlikely to return to the old policy, and decided that the award of nominal damages for past wrongs was insufficient to avoid mootness. A. at 5a-6a. The decision fractured the Second Circuit from the majority of the other circuits that have considered this issue. Whether an award of nominal damages prevents a case from becoming moot is an issue that has caused division and confusion in the lower courts in a variety of different contexts. Therefore, petitioners respectfully request that the Court grant the petition.

STATEMENT OF THE CASE

The SA forced Scott Barea, Julien Starr, and College Standard Magazine to give their money to create a public forum for student speech. A. at 2a. Such a system is constitutional provided that the SA distributes the money in a viewpoint neutral manner. *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 233 (2000). In this case, the SA did not. The district found that the SA could deny a student group funding for any reason including reasons having to do with the popularity of the group with other students. A. at 10a-12a.

Barea, Starr, and about two dozen other students formed a newspaper called College Standard

Magazine. A. at 2a. College Standard applied for funding, the SA denied this request despite the invocation of *Southworth* and a threat of legal action by plaintiffs.[1] The students and College Standard then sued the SA. Prior to summary judgment, the SA established a new written policy. A. at 3a.

Both parties moved for summary judgment. A. at 2a. The trial court held that the policy was unconstitutional on its face. A. at 10a-13a. The court began by noting that the SA lacked "adequate standards to avoid the problem of unbridled discretion ... [because] defendants believed they could ... deny funding for any reason at all." A. at 10a. The judge explained that "[t]he existence of unabridged discretion presents the risk that the decision maker – here, the student association – will use its broad discretion to favor or disfavor speech based on its content." A. at 10a-11a.

Next, the trial court found that the SA's funding guidelines were not viewpoint neutral. "To the extent that [the SA] did have standards, they admitted to using criteria such as the number of active members in the recognized student organization, whether the recognized student organization was active on campus, and how accessible the student organization was to students ... . Several of these written factors, however, can be related to speech or viewpoint." A. at 11a.

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[1]The SA, according to its own sworn testimony, denied College Standard funding because it was "offensive", "obnoxious", "National Enquirer like", "conservative", "arrogant", "combative", "twisted", "aggressive", and "not an organization that everybody thinks should get the money."

Accordingly, the district court held that "the largely unbridled discretion afforded the student association, coupled with the improper factors it used in its unwritten policy" violated College Standard's and plaintiff-students' First Amendment rights. A. at 11a-12a.

The district found questions of facts on the SA's motive in the as applied challenge and therefore denied both parties' motions for summary judgment on that claim. After summary judgment was granted on the facial challenge, all of the plaintiffs accepted damages of one dollar each on the facial challenge and agreed to the dismissal of the as applied challenge. *See* A. at 3a (noting that the SA's policy was unconstitutional on its face and that "the plaintiffs are entitled to an award of nominal damages in the amount of one dollar"); A. at 15a.

On appeal, the Second Circuit vacated the judgment as moot. A. at 5a. The circuit court reasoned that, since the policy was no longer in effect and plaintiffs had dropped the as applied challenge, an award of nominal damages would have no effect on the parties' legal rights — "we cannot issue a decision that would confer any relief to the plaintiffs and therefore lack jurisdiction." A. at 4a.

REASONS FOR GRANTING THE WRIT

The Court should grant this petition because the Courts of Appeals have become deeply divided over whether the availability of nominal damages prevents a case from becoming moot when during the litigation the government repeals or replaces the challenged policy. The Second Circuit's decision has

deepened this fracture. The Third, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits hold that a claim for nominal damages avoids mootness;[2] by contrast, the Second Circuit in this case adopted the contrary view that the award of nominal damages is insufficient to prevent mootness, a view also embraced in the Sixth Circuit and the Eastern District of Wisconsin.[3]

Only one side of the split can be right — either cases like this one should be dismissed as moot or plaintiffs, like petitioners here, should prevail and be awarded nominal damages together with their fees and costs. Either governments are paying when they should not have to, or plaintiffs are being denied their costs and fees when they deserve to be reimbursed. Until the issue is resolved, parties (in circuits that have wrongly decided the issue) are being forced unjustly to bear risks and costs of litigation that they should not.

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[2] *See Burns v. PA Dept. of Correction*, 544 F.3d 279, 284 (3rd Cir. 2008); *Covenant Media of SC, LLC v. City of North Charleston*, 493 F.3d 421, 429, n. 4 (4th Cir. 2007); *Morgan v. Plano Independent School Dist.*, 589 F.3d 740, 748-49 (5th Cir. 2009); *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir.2006); *Jacobs v. Clark County School District*, 526 F.3d 419, 426 (9th Cir. 2008); *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1258 (10th Cir. 2004).

[3] *See Morrison v. Board of Educ. of Boyd County*, 521 F.3d 602, 611 (6th Cir. 2008); *Freedom From Religion Foundation, Inc. v. City of Green Bay*, 581 F.Supp.2d 1019, 1031-32 (E.D. Wis. 2008).

Additionally, the minority side of the split has a particularly pernicious effect upon free speech. Circuits, like the Sixth and Second, allow government officials to use the judicial system to gauge the lawfulness of a speech inhibiting policy, and then when the policy is about to become unconstitutional or is declared unconstitutional, the case can be mooted by amending the offending policies at the eleventh hour without incurring any liability for damages or attorney fees. This process can take months or even years. In essence, the minority view allows the government to engage in free censorship during the course of the litigation.

This Court should grant the petition to resolve the divergent application of the mootness doctrine between the Courts of Appeals.

I. The Courts of Appeals have become deeply divided over whether the availability of nominal damages prevents a case from becoming moot when during the litigation the government repeals or replaces the challenged policy and this division has important consequences to civil rights plaintiffs and government defendants.

Nominal damages are appropriate if a plaintiff establishes a violation of a fundamental constitutional right, even if he cannot prove actual injury sufficient to entitle him to compensatory damages. "[C]ourts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). This Court has noted with

approval the award of nominal damages under § 1983 "where deprivations of constitutional rights are not shown to have caused actual injury." *Id.* at 266, n. 24. "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed ... ." *Id.* at 266. *See also Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 n. 11, (1986) (noting that "[n]ominal damages ... are the appropriate means of "vindicating" [First Amendment] rights whose deprivation has not caused actual, provable injury").

The issue presented of course is not whether nominal damages are appropriate in a First Amendment facial challenge where students have been paid required into a mandatory fee system and a group was denied funding, but whether the availability of nominal damages prevents a case from becoming moot when during the litigation the government repeals or replaces the challenged policy. The Court has not expressly addressed this question. *See Utah Animal Rights Coalition*, 371 F.3d at 1266 (noting this Court has not addressed the question of whether "a claim for nominal damages is sufficient to maintain the justiciability of a case that otherwise would be moot"); *Freedom From Religion Foundation, Inc.*, 581 F. Supp. 2d at 1033 ("conclude[ing] that neither the Supreme Court nor the Seventh Circuit has spoken decisively on the issue").

A. The majority of the Courts of Appeals have held in essence that the repeal or replacement of an unconstitutional law does not erase the slate and the award of nominal damages holds defendants responsible for their past unlawful action — two Circuits, the Sixth and now the Second have departed from this growing consensus.

The Circuit Courts are divided over whether the availability of nominal damages prevents a case from becoming moot when the alleged unconstitutional law has been repealed or replaced. Six Courts of Appeals have held that a claim for nominal damages is sufficient to prevent dismissal for mootness. *See supra* n 2. The majority of Courts of Appeals have held in essence that the repeal or replacement of an unconstitutional law does not erase the slate and the award of nominal damages holds defendants responsible for their past illegal actions. Two Circuits, the Sixth and now the Second have departed from this growing consensus. *See supra* n 3.

The majority rule is typified by the Fifth Circuit's decision in *Morgan v. Plano Independent School Dist.*, 589 F.3d 740, 748-49 (5th Cir. 2009). In *Morgan*, plaintiffs brought a facial challenge to a school district's literature distribution policy seeking both declaratory relief and nominal damages. The school changed its policy in the middle of the litigation and the district court dismissed the facial challenge to the policy as moot. The Fifth Circuit reversed, holding that "this court and others have consistently held that a claim for nominal damages avoids mootness." *Id.* at 748.

The Ninth Circuit reached the same conclusion in a similar context in *Jacobs v. Clark County School District*, 526 F.3d 419, 426 (9th Cir. 2008). *Jacobs* dealt with a school dress code which had been repealed during litigation. The court held that "although [plaintiffs] may be entitled to collect *only* nominal damages were they to succeed on their free speech claims, they nonetheless present justiciable challenges to all speech-related aspects of the [defendant's] uniform policy." *Id.* at 426 (emphasis in the original). *See also Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002) (holding that "[a] live claim for nominal damages will prevent dismissal for mootness").

The Tenth Circuit struggled to reach the same conclusion in *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1258 (10th Cir. 2004). In that case, protesters brought an action against city defendants, raising facial challenges to the process for obtaining a permit to demonstrate. While still in the trial court, the City amended the ordinance to cure the alleged defect in the original permitting scheme. The district court dismissed the case as moot. The protesters appealed arguing that a claim for nominal damages prevented their facial claim from being declared moot. *Id.* at 1258, n. 3. The Tenth Circuit agreed. It held that although the challenged law was amended to correct its alleged constitutional flaw and plaintiff suffered no compensable injury, an award of nominal damages required the court to determine whether a no-longer-

operative law comported with the First Amendment. *Id.*[4]

Utah Animal Rights Coalition inspired three separate opinions, induced a plea for this Court's intervention;[5] and incited other courts to break from the majority rule.[6]

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[4]The question of whether nominal damages prevents mootness occurs in other contexts and other circuits — the majority reaching the same conclusion — the plea for nominal damages avoids mootness in the face of a change of governmental policy. For example, the Third Circuit in a prisoner discipline case reasoned that case was not moot despite cessation of alleged unconstitutional conduct because plaintiff sought an award of nominal damages. *Burns v. PA Dept. of Correction*,544 F.3d 279, 284 (3d Cir. 2008). Likewise the Fourth Circuit held that a billboard company's suit was not moot although the city revised its unconstitutional regulation prior to judgment because plaintiff was entitled to at least nominal damages if it prevailed on its claim. *Covenant Media of SC, LLC v. City of North Charleston*, 493 F.3d 421, 429, n.4 (4th Cir. 2007). *See also Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir.2006) (holding that a city's revisions of its sign ordinance did not moot a sign company's claim because the company made a claim for nominal damages which it would be entitled to collect if it prevailed on its first amendment claim).

[5] *See Utah Animal Rights Coalition*, 371 F.3d at 1258 (McConnell, J. concurring) (urging this Court to decide if a prayer for nominal damages saves an otherwise nonjusticiable from becoming moot).

[6] *See Morrison*, 521 F.3d at 611 (citing to *Utah Animal Rights Coalition* as a basis for holding that nominal damages awarded based upon a policy no longer in existence did not prevent dismissal because of mootness); *Freedom From Religion Foundation, Inc.*, 581 F.Supp.2d at 1031-1032 (relying on *Utah Animal Rights Coalition* as justification for dismissing

B. Until the issue is resolved, parties (in circuits that have wrongly decided the issue) are being forced unjustly to bear risks and costs of litigation that they should not.

The arguments for each side of the issue are simple but irreconcilable.

The argument for invoking the mootness doctrine to dismiss a case where the government has repealed or replaced the challenged law is that nominal damages are the functional equivalent of declaratory relief. "Where ... the challenged past conduct did not give rise to a compensable injury and there is no realistic possibility of a recurrence, nominal damages have no more legal effect than would injunctive or declaratory relief in the same case." *Utah Animal Rights,* 371 F.3d at 1268 (McConnell, J., concurring). *See also, Morrison*, 521 F.3d at 611 (holding that nominal damages awarded based on a policy no longer in existence was an insufficient basis for jurisdiction because such an award would have no effect on the parties' legal rights). This was exactly the reasoning the Second Circuit employed in this case — "we cannot issue a decision that would confer any relief to the plaintiffs and therefore lack jurisdiction." A. at 4a.

The argument against invoking the mootness doctrine to dismiss a case where during the litigation the government has repealed or replaced the challenged law is that nominal damages are

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a case for lack of standing where government changed its policy and plaintiff's only claim was for nominal damages).

awarded to redress a real past harm suffered where no quantifiable damages can be proved. The logic is simple: plaintiff's constitutional rights were truly harmed by defendant, defendant should have to pay for the harm even when damages are not measurable. The violations of constitutional rights are not valueless, it is that the value cannot be measured[7] — "By making the deprivation of [constitutional] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury...." *Carey*, 435 U.S. at 266.

The Courts of Appeals have disagreed over which reasoning is proper and therefore which rule of law is correct. This division poses serious consequences for both §1983 plaintiffs and governmental defendants. On the one hand if a change or repeal of an unconstitutional policy suffices to moot a case despite a plea for nominal damages, then in the majority of circuits, governments are wrongly being forced to bear the plaintiffs' costs and attorney fees.

On the other hand, in the minority of circuits, if the award of nominal damages does not avoid mootness, plaintiffs are being barred from vindicating constitutional rights that have truly been infringed because defendants may dodge both

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[7] *Memphis Community School Dist.*, 477 U.S. at 310 (noting that "history and tradition do not afford any sound guidance concerning the precise value that juries should place on constitutional protections").

judgment and costs and fees by eleventh hour evasive maneuvers.

Moreover, the minority regime may encourage unconstitutional conduct — that is to say, the more a law crosses the constitutional boundary, the more likely the government is to change the law if sued, which makes it less likely that a plaintiff would challenge the law because they will not be able to obtain a firm final judgment or recover the expense of suing. Meanwhile, the government gets to "test the waters" all the way through the trial court and even through argument on appeal, at which point if things look worrisome, the government can suddenly repeal the challenged policy and walk away unscathed.[8]

Only one side of the split can be right — either such cases as petitioners should be dismissed as moot letting defendants off the hook or plaintiffs, like petitioners, should prevail and be awarded their fees and costs. Until the issue is resolved, parties (in circuits that have wrongly decided the issue) are being forced unjustly to bear risks and costs of litigation that they should not. Petitioners request, therefore, that the Court grant their petition to resolve the divergent application of the mootness

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[8] *See e.g., Beta Upsilon Chi Upsilon Chapter at the University of Florida v. Machen*, 586 F.3d 908, 914 -915 (11th Cir. 2009) (involving a case where an appellate court granted plaintiff injunctive relief pending appeal against university in a first amendment challenge to a discriminatory university policy, *after* oral arguments, to avoid defeat, the university announced to the circuit court that they had modified their policy; thereafter, the circuit ordered the entire case dismissed as moot).

doctrine and to set a uniform interpretation of the laws of the United States.

C. The minority side of the circuit split has a particularly pernicious effect upon free speech cases like this one where the government possesses unbridled discretion to determine access to a forum.

The minority side of the split has a particularly pernicious effect in unbridled discretion cases like this one. The central vice of unbridled discretion is that the government can hide unconstitutional viewpoint discrimination in surreptitious ways that are difficult to detect. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130-131 (1992); *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002). "[T]he use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the [government] is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988). When viewpoint discrimination can be easily disguised, it follows that viewpoint discrimination is hard to prove. *Id.* at 758-59.

Therefore, without the ability to prove actual viewpoint discrimination in a particular instance in unbridled discretion cases, plaintiffs, like petitioners here, are left to mount facial challenges. No damages, except nominal ones, typically flow from a facial challenge. Consequently, such plaintiffs are particularly vulnerable to having cases mooted by changes in the policy made during the course of

litigation. As a result, government regulators have little to lose in adopting a scheme that permits unbridled discretion in determining access to a forum.

Circuits like the Sixth and Second essentially allow governmental officials to use the judicial system to gauge the lawfulness of policy, and then at the last second moot the challenge by amending the offending policies. If petitioners' case arose in either the Third, Fourth, Fifth, Eighth, Ninth, or Tenth Circuits, they would have had the opportunity to obtain a judgment for actually suffering under a facially unconstitutional policy. The right to have a case adjudicated should not depend on a geographical accident. Petitioners, therefore, request the Court to grant their petition.

D. In the decade since this Court's decision in *Buckhannon* the question whether nominal damages prevent a case from becoming moot, where the government has changed or repealed an alleged unconstitutional policy, has come strikingly to the fore.

Over the last decade, cases involving the question of whether nominal damages prevent the invocation of the mootness doctrine have come strikingly to the fore. The rash of these types of cases and the concomitant circuit split may be a by-product of *Buckhannon Bd. and Care Home, Inc. v. West*

Virginia Dept. of Health and Human Resources, 532 U.S. 598, 606 (2001).[9]

Generally pre-*Buckhannon*, § 1983 plaintiffs would file a complaint seeking declaratory and injunctive relief from an unconstitutional law. A change or a repeal to the challenged law that was triggered by the suit would allow § 1983 plaintiffs to be considered a prevailing party under a "catalyst" theory and permit them to recover their attorney fees and costs. *Id.* at 601-02.

Buckhannon rejected the catalyst theory and ushered in a new era — one in which § 1983 plaintiffs, in addition to seeking equitable relief (which would become moot if the governmental defendants repealed or replaced the policy), have had an incentive to also seek nominal damages in order to ensure government accountability for unconstitutional action. The Court foreshowed as much by noting that "[any] fear of mischievous defendants [who would moot a claim by a belated change in policy] only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Id.* at 608-09.

The catalyst theory is not at issue here. Rather the elimination of that theory, for better or worse, has caused a change in behavior of § 1983 plaintiffs.

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[9] *See supra* nn 2-3 (collecting cases that have dealt with whether nominal damages prevents mootness where the government has repealed or replaced the challenged law all of which occurred subsequent to this Court's decision in *Buckhannon*).

It is this change of behavior in response to *Buckhannon* that have forced courts to deal with the issue of whether nominal damages prevent mootness in the face of changed policy. The issue has spawned a deep circuit split and petitioners urge the Court to grant their petition to resolve it.

CONCLUSION

The issue of whether nominal damages prevents mootness in the face of changed policy has occurred in a variety of settings. Whether inside of prisons (*Burns v. PA Dept. of Correction*, 544 F.3d 279, 284 (3rd Cir. 2008)), at universities (*College Standard Magazine v. Student Association of the State of University of New York at Albany*, 610 F.3d 33 (2nd Cir. 2010)), on street corners (*Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1258 (10th Cir. 2004)), upon a billboard (*Covenant Media Of SC, LLC v. City of North Charleston*, 493 F.3d 421, 429, n. 4 (4th Cir. 2007)), or during high school (*Morgan v. Plano Independent School Dist.*, 589 F.3d 740, 748-749 (5th Cir. 2009)), the government tries to moot cases they are likely to lose and § 1983 plaintiffs fight to keep claims alive by seeking nominal damages. The lower courts have divided over the resolution of this issue and created a circuit split. Therefore, petitioners respectfully urge this Court to grant certiorari.

Respectfully submitted,

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December 20, 2010

APPENDIX

Opinion of the U.S. Court of Appeals for the Second Circuit (July 1, 2010) 1a

Decision of the U.S. District Court for the Northern District of New York (August 8, 2005) (Excerpt of Transcript Proceedings containing decision.) 9a

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Order denying Appellee's Petition for Rehearing *en banc* of the U.S. Court of Appeals for the Second Circuit (September 20, 2010) 18a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COLLEGE STANDARD MAGAZINE, JEFFREY SCOTT BAREA, AND JULIEN A.M. STARR,

Plaintiffs-Appellees,

v.

STUDENT ASSOCIATION OF THE STATE OF NEW YORK AT ALBANY*,

Defendants-Appellants.

No. 07-0891

Argued: December 22, 2008.
Decided: July 1, 2010

Before: NEWMAN, CALABRESI, and SACK, Circuit Judges. Judge Calabresi concurs in a separate opinion

PER CURIAM:

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* The State University of New York at Albany, named as a defendant in the Verified Complaint, was voluntarily dismissed while this case was pending in the district court.

Defendant Student Association (the "SA") of the State University of New York at Albany ("SUNY-Albany") appeals from a decision of the United States District Court for the Northern District of New York granting summary judgment in favor of plaintiffs College Standard Magazine ("CSM"), a campus organization that publishes a politically conservative newspaper, and its founders, Jeffrey Barea and Julien Starr, on their challenge under the First Amendment to a policy pursuant to which the SA distributed funds comprising the proceeds of a mandatory student activity fee to student groups. The district court concluded that the policy was facially unconstitutional because it vested in the SA "unbridled discretion" to decide how to distribute the funds, thereby presenting an impermissible risk of viewpoint discrimination, and because unwritten guidelines allegedly employed by the SA in making funding decisions improperly implicated the viewpoint of putative recipients.

The plaintiffs were denied funding under the challenged policy in February of 2003. They initially challenged the policy both facially and as-applied. After the district court ruled in their favor on the facial challenge, the plaintiffs stipulated to the entry of summary judgment against them on the as-applied challenge from which they cannot and have not appealed. Thus the plaintiffs have conceded, for present purposes, that they suffered no harm from the denial of funding to their organization under the challenged policy.

This appeal therefore concerns only the plaintiffs' facial challenge to the policy. But the funding policy challenged by the plaintiffs is no longer in place at

SUNY-Albany. The SA amended its constitution in the Spring of 2003 to include regulations on funding that explicitly require viewpoint neutrality. The plaintiffs have made clear that this lawsuit does not challenge the new funding policy, and there is no indication that the former, challenged funding policy will be reinstated.

We are thus asked to consider the constitutionality of a funding policy that is no longer in effect, and that is not alleged to have caused the plaintiffs harm when it was in effect. This we cannot do. We are restricted to deciding "actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue in the case before [us]." *Local No. 8-6, Oil, Chem. and Atomic Workers Int'l Union, AFL-CIO v. Missouri,* 361 U.S. 363, 367, 80 S.Ct. 391, 4 L.Ed.2d 373 (1960) (internal quotation marks omitted).

There is no judgment we could issue here that could be effective. Even if we could enjoin the challenged policy now that it has been repealed, that is not the remedy the plaintiffs are currently seeking. In their stipulation, they have agreed that "with regard to the claim in the complaint that the defendant Student Association's policies for allocating mandatory student activity fee money to recognized student groups in effect on February 14, 2003 were unconstitutional on [their] face, the plaintiffs are entitled to an award of nominal damages in the amount of one dollar ($1.00) upon the [District] Court's determination set forth in the transcript of the Court's bench Decision." *See*

Stipulation of Settlement and Order, *College Standard Magazine v. Student Ass'n of the State Univ. of N.Y. at Albany*, No. 03 Civ. 0505 (N.D.N.Y. Mar. 30, 2005), Doc. No. 107 (Feb. 2, 2007). The district court's judgment, from which the plaintiffs have not cross-appealed, similarly reflects that the parties stipulated to an amount of damages in the total sum of $1.00, without any mention of an injunction. And we could not order damages for any harm the policy inflicted on the plaintiffs because the as-applied challenge has been conceded. Any declaration that the policy was unconstitutional would be strictly advisory. *Cf. Hewitt v. Helms*, 482 U.S. 755, 761, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987) ("The real value of the judicial pronouncement-what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion-is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*") (emphasis in original).

In light of the repeal of the challenged policy and the concession as to the as-applied challenge, we cannot issue a decision that would confer any relief to the plaintiffs and therefore lack jurisdiction over this appeal. *See, e.g., Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) ("appeal must be dismissed" as moot where court cannot grant " 'any effectual relief whatsoever' ") (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895)); *see also Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir.1997) (referring to "general rule that legislative repeal of a statute renders a case moot"); *cf. City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982) (upholding

justiciability of challenge to practice that City had voluntarily ceased but planned to reinstate).

The parties' failure to raise in their briefs the question of whether this appeal is moot for the foregoing reasons does not allow us to proceed despite the absence of a live case or controversy. "[W]e have an independent obligation to consider the presence or absence of subject matter jurisdiction *sua sponte*." *Joseph v. Leavitt*, 465 F.3d 87, 89 (2d Cir.2006); *see also, e.g., Muhammad v. City of New York Dep't of Corr.*, 126 F.3d 119, 122-23 (2d Cir.1997) (mootness is an issue of subject matter jurisdiction).

For these reasons, the appeal is dismissed as moot and the judgment of the district court is vacated.[1] "It is well established that, when a matter becomes moot on appeal, federal appellate courts will generally vacate the lower court's judgment except where actions attributable to one of the parties rendered the appeal moot...." *Catanzano v. Wing*, 277 F.3d 99, 108 (2d Cir.2001) (internal quotation marks omitted). *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40, 71 S.Ct. 104, 95 L.Ed. 36 (1950); *see also Van Wie v. Pataki*, 267 F.3d 109, 115 (2d Cir.2001) (explaining that vacatur "avoids giving preclusive effect to a judgment never reviewed by an appellate court" (internal quotation marks omitted)). *Cf. Russman v. Bd. of Educ. of*

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[1] Because we vacate the judgment of the district court on the basis of the mootness of the appeal, we need not determine whether this case was moot while it was pending before the district court, which it may have been. See concurring opinion of Calabresi, *J.* If it was, of course, we would also be required to vacate the district court's decision for that independent reason.

Enlarged City Sch. Dist. of City of Watervliet, 260 F.3d 114, 122 (2d Cir.2001) (noting exception to general rule of vacatur where "appellant has caused the mootness").[2]

CONCLUSION

For the foregoing reasons, the appeal is dismissed for want of jurisdiction, and the district court judgment is vacated. The case is remanded to the district court and the court is directed to dismiss the Verified Complaint as moot.

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[2] The actions of the appellant SA did not cause the mootness. The challenged policy had already been repealed before the district court ruled on the facial challenge. Following that ruling, the parties stipulated to the entry of summary judgment against the plaintiffs on the as-applied challenge, thus effectively agreeing that the plaintiffs had suffered no harm from the policy. *Cf. Russman*, 260 F.3d at 122 ("[W]hen the appellee has caused the case to become moot, we vacate the district court's judgment to prevent the appellee from insulating a favorable decision from appellate review.").

CALABRESI, Circuit Judge, concurring:

I agree with everything substantive in the *per curiam* opinion[1] and join it in full. I add a few lines because I think it is worthwhile to point out that this case was in fact moot at the district court level.

In Spring 2003, the defendant Student Association abolished the challenged funding policy. In September 2005, the district court granted the Plaintiffs' summary judgment motion as to liability. In October 2006, the parties entered into the stipulation that-we have held-caused this case to become moot. Then, in February 2007, final judgment was entered, and the Student Association timely appealed.

The event which led us to find that this case is moot happened between the district court's grant of summary judgment and the entry of final judgment below. I write to underscore that even after summary judgment has been granted, if, before the entry of final judgment, something occurs that causes a case to cease to be an Article III case or controversy, that action becomes moot and should be dismissed forthwith. This is so because the "case-or-controversy requirement subsists through all stages of federal judicial proceedings," *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (internal quotation marks omitted); *see also Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 70 (2d Cir.2001).

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[1] I would, however, for the sake of Latin, substitute "[*nostra*]" for "*sua* " in the quotation from *Joseph v. Leavitt*, 465 F.3d 87, 89 (2d Cir.2006), *ante*, at 35.

Moreover, the fact that the case was moot before the district court entered final judgment forecloses any possible claim by the Plaintiffs for attorneys' fees under 42 U.S.C. § 1988(b). "Whether [a plaintiff] can be deemed a 'prevailing party' in the District Court, even though its judgment was mooted after being rendered but before the losing party could challenge its validity on appeal, is a question of some difficulty." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 483, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990); *see also Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 454 (1st Cir.2009) (answering the question in the affirmative and collecting other cases doing the same). But that question cannot arise in this case. "Since the judgment below is vacated on the basis of an event that mooted the controversy before the [district court's] judgment issued, [the Plaintiffs were] not, at that stage, ... 'prevailing part[ies]' as [they] must be to recover fees under § 1988." *Lewis*, 494 U.S. at 483, 110 S.Ct. 1249.

(Excerpt of Transcript Containing Decision)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

COLLEGE STANDARD MAGAZINE, *et al.* *Plaintiffs,* *-versus-* STATE UNIVERSITY OF NEW YORK AT ALBANY, *et al.*, *Defendant.*	03-CV-505 (DECISION)

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of new York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, New York 12207, on MONDAY, AUGUST 8, 2005, before the HON. THOMAS J. McAVOY, United States District Court Judge.

. . .

THE COURT: This case is back before the Court on a motion for reconsideration. Familiarity with the background and the prior decision in this case is assumed. Plaintiffs move for reconsideration on the ground that the Court did not address their argument that defendants' unwritten funding

policies are unconstitutional on their face. The defendants cross move for reconsideration on the ground that the Court failed to consider plaintiff's lack of evidentiary proof that the opinions of certain student association members may have tainted a majority of the voting student association members and that such taint led to the denial of funding.

Plaintiffs argue that the student association's unwritten funding policy is unconstitutional on its face because it gives the student association unbridled discretion and because defendants admitted having taken into consideration such factors as the number of active members in the organization and whether the organization was active on the campus and accessible to a wide group of students.

Although the student association did not have any written internal policies at the time plaintiffs applied for funding, it did have to work within the boundaries of 8 New York Rules and Regulations Section 302.14(c)(3). Thus, it did have some limitations. Nevertheless, the Court agrees with plaintiff that there is insufficient evident of adequate standards to avoid the problem of unbridled discretion. This Court adopts the reasoning in *Southworth v. Board of Regents of the University of Wisconsin*, 307 F. 3d 566, 578 and 579, wherein the Seventh Circuit held that a prohibition on unbridled discretion is an element of viewpoint neutrality. See also *Forsyth County Georgia v. The Nationalist Movement*, 12 S. Crt. 2395. The existence of unabridged discretion presents the risk that the decisionmaker – here, the student association – will use its broad discretion to favor or disfavor speech

based on its content. *Southworth* at 579. Although New York State regulations discussed above provide very broad categories of purposes for which funding may be allocated, it does not set out a mechanism for approving or disapproving funding requests or otherwise allocating funding among recognized student organization.

As mentioned in the Court's prior ruling from the bench, the defendants have admitted not having a written policy. To the extent that defendants did have standards, they admitted to using criteria such as the number of active members in the recognized student organization, whether the recognized student organization was active on campus, how accessible the recognized student organization was to students, and whether the recognized student organization was a small group who merely wanted money for a party. There's also evidence that defendants believed they could be denied funding for any reason at all.

Several of these written factors, however, can be related to speech or viewpoint. As the Seventh Circuit noted in *Southworth*, quote, the University cannot use the popularity of the speech as a factor in determining funding, close quote. *Southworth*, at 594. Thus, for example, looking to the number of active members in the recognized student organization can be seen as getting involved in issues concerning the popularity of a particular recognized student organization. Granting funding based on the number of students in the organization can be seen as treating minority viewpoints differently from majority viewpoints. While the number of students in the organization may in

certain circumstances be a legitimate factor in determining the amount of financing, see *Southworth*, 307 F. 3d at 595, it is not proper in determining whether to grant funding at all. The Seventh Circuit further noted in *Southworth* that, quote, consideration of the length of time in organization has been in existence and the amount of funding an organization has received in the past discriminates against less traditional viewpoints, end quote. *Southworth* at 594. The reasoning in *Southworth* equally applies here to consideration of the number of members in an organization and whether the recognized student organization is accessible to a wide range of students and how active the group was on campus. An organization with less popular viewpoints I unlikely to have many member, may not have the resources to be as active as more popular groups, and may be less known or less interesting to a wide range of students. Nonetheless, as noted, a group holding less popular viewpoints is not entitled to any less First Amendment protection than any other groups. Accordingly, the Court find that the largely unbridled discretion afforded the student association, coupled with the improper factors it used in its unwritten policy, were facially invalid.

Because plaintiffs raised the facial invalidity of the funding policies in their motion for summary judgment and the Court did not consider the facial validity of the funding policy in light of defendants' contentions concerning its claimed unwritten policy, plaintiff's motion for reconsideration is granted. Accepting defendants' facts as true, and assuming they did have such as unwritten policy, the student association's unwritten policy allows for too much

discretion. The student association's policy also takes into consideration factors that are improperly related to the content of the speech. Accordingly, plaintiff's motion for summary judgment must be granted. Because the Court finds the student association's funding policy to have been facially unconstitutional, the Court need not address defendants' motion for reconsideration. Accordingly, that motion is denied.

Plaintiffs shall submit an order on notice to defendants within 11 days of today's date.

(Court adjourned at 10:40 AM.)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

COLLEGE STANDARD MAGAZINE, *et al.*

Plaintiffs,

v.

STATE UNIVERSITY OF NEW YORK AT ALBANY, *et al.*,

Defendant.

AMENDED

Judgment in a Civil Case

Case No. 1:03-CV-505

__ **JURY VERDICT.** This action came before this Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xx **DECISION BY COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to plaintiffs' [11] Notice of Dismissal dated May 13, 2003, the complaint was voluntarily dismissed against defendant, State University of New York at Albany.

As to the plaintiffs' 42 U.S.C. § 1983 First Amendment right violations, the Court granted plaintiffs summary judgment against defendant, The Student Association of the State University of New York at Albany, finding that such student association funding policy was deemed unconstitutional in accordance with Senior Judge Thomas J. McAvoy's [90] Order dated September 3, 2005. The parties have stipulated to the amount of damages in the total sum of $1.00 as placed upon the record on October 11, 2006.

Dated: February 6, 2007

Lawrence K. Baerman
Clerk of Court

s/ C.M. Ligas
By: Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

COLLEGE STANDARD MAGAZINE, *et al.*

Plaintiffs,

v.

STATE UNIVERSITY OF NEW YORK AT ALBANY, *et al.*,

Defendant.

AMENDED

Judgment in a Civil Case

Case No. 1:03-CV-505

__ **JURY VERDICT.** This action came before this Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xx **DECISION BY COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to the plaintiffs' [11] Notice of Dismissal dated May 13, 2003, the complaint was voluntarily dismissed against defendant, State University of New York at Albany.

As to the plaintiffs' 42 U.S.C. § 1983 First Amendment right violations, the Court granted

plaintiffs summary judgment against defendant, The Student Association of the State University of New York at Albany, finding that such student association funding policy was deemed unconstitutional in accordance with Senior Judge Thomas J. McAvoy's [82] Order dated July 9, 2005; however, the Court did not reach a decision as to the remaining cause of action relating to the discriminatory voting practices. The parties have stipulated to the amount of damages in the total sum of $1.00 as placed upon the record on October 11, 2006.

Dated: October 18, 2006

Lawrence K. Baerman
Clerk of Court

s/ C.M. Ligas
By: Deputy Clerk

UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

Filed September 20, 2010

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of September, two thousand-ten,

_____x

Docket No. [s]: 07-0981-cv

College Standard Magazine, Jeffrey Scott Barea, and Julien A.M. Starr,

Plaintiffs-Appellees,

v.

Student Association of the State University of New York at Albany,

Defendant-Appellant.

_____x

Appellees College Standard Magazine, Jeffrey Scott Barea and Julien A.M. Starr filed a petition for panel rehearing, or in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition be denied.

FOR THE COURT:

s/Catherine O'Hagan Wolfe, Clerk of Court

184

No. 10 822

Supreme Court, U.S.
FILED
MAR 21 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

COLLEGE STANDARD MAGAZINE, JEFFREY SCOTT BAREA, and JULIEN A.M. STARR,
Petitioners,

v.

STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK AT ALBANY,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION IN BEHALF OF STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK AT ALBANY

Lewis B. Oliver, Jr.,
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Albany, New York 12202
518-463-7962

QUESTIONS PRESENTED

I

Whether the Second Circuit's decision, that a request for an award of nominal damages does prevent a case from becoming moot, is in harmony with the decisions in the Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits.

II

Whether the Second Circuit's decision, holding that the changes in the Student Association's constitution and policies, made in the fall of 2003 while the case was still pending in the District Court, to comply with the viewpoint neutral criteria for distributing mandatory student activity fee money in Southworth caused the petitioners' facial challenge to the former policies to become moot, was correct.

III

Whether the Second Circuit's decision, holding that petitioner College Standard Magazine's stipulation agreeing to summary judgment in favor of the Student Association on petitioners' as applied challenge to the Student Association's vote denying funding with mandatory student activity fee money caused the case to become moot and deprived the court of a case or controversy under Article III, was correct.

IV

Whether the petitioners' claim for attorneys fees is barred by the decision in Buckhannon Board

and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 US 598 (2001), which eliminated the "catalyst theory" for determining who is a prevailing party under the fee shifting statute.

RULE 29.6 STATEMENT

Respondent Student Association of the State University of New York at Albany is a non-profit educational corporation organized under the Not-for-Profit Corporation Law of the State of New York, and there is no stock and therefore there is no parent corporation and no publicly held corporation that owns any stock.

At the time the complaint was filed, the Student Association was an unincorporated association under the common law of the State of New York; it was incorporated after this action was commenced.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 3

STATEMENT OF JURISDICTION 3

CONSTITUTIONAL PROVISIONS AND POLICY 3

COUNTER STATEMENT OF THE FACTS 4

REASONS FOR DENYING THE WRIT 14

I. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS WHICH MERITS REVIEW BY THIS COURT 14

II. THE PETITIONERS' CLAIM IS BARRED BY THE BUCKHANNON DECISION 22

III. THE PETITIONER'S HAVE WAIVED THEIR RIGHTS TO CLAIM ANY INJURY AND HAVE NO STANDING 24

APPENDIX

STIPULATION OF SETTLEMENT AND ORDER 2a

LETTER BRIEF TO HON. THOMAS J. McAVOY 6a

TABLE OF AUTHORITIES

CASES — PAGES(S)

Board of Regents of University of Wisconsin v. Southworth, 529 US 217 (2000) 1, 5

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 US 598 (2001) 21, 22, 23, 24

College Standard Magazine v. Student Assocation of the State University of New York at Albany, 610 F3d 33 (2d Cir. 2010) 3, 10, 11, 12, 13, 16

Dawes v. Walker, 239 F3d 489, (2d Cir. 2001).....17

Diesel v. Town of Lewisboro, 232 F3d 92, (2d Cir. 2000).....17

Morrison v. Board of Education of Boyd County, 521 F3d 602 (6th Cir. 2008).....18, 19

Pagan v. Village of Glendale, 559 F3d 477 (6th Cir. 2009) 18

Van Wie v. Pataki, 267 F.3d 109, (2d Cir. 2001).....17

INTRODUCTION

Petitioners, who published a newspaper entitled College Standard Magazine on the campus of the State University of New York at Albany, filed a complaint pursuant to 42 U.S.C 1983 against the Student Association at the University which contained two claims, first, that the Student Association's policies for allocating mandatory student activity fee money to recognized student organizations (RSOs) were not viewpoint neutral and on their face violated the First Amendment, and, second, that the vote by the Student Association's Central Council in February 2003 to deny the application for funding violated the First Amendment as applied because it was motivated by discrimination against petitioners' political views. In the spring of 2003 the Student Association amended and superseded its policies for allocating mandatory student activity fee money in compliance with the decision of this Court in Board of Regents of University of Wisconsin System v. Southworth, 529 US 217 (2000), which made the claim of facial unconstitutionality moot. In 2005, after the Student Association had superseded its policy, the District Court granted summary judgment in favor of petitioners on the facial challenge to the policy and the parties stipulated to nominal damages of one dollar ($1.00), even though that issue had been mooted several years before. Rather than go to trial on the only remaining claim, petitioners stipulated that the defendant Student Association was entitled to summary judgment in its favor on the petitioners' claim that the February 2003 vote violated College Standard Magazine's constitutional rights, which made the as applied claim moot. However, both

parties wished to have a decision on the merits of the issue whether the Student Association's former policies for allocating student activity fees to RSOs had been discriminatory under the First Amendment, and therefore neither party raised the issue of mootness in either the District Court or in their briefs to the Second Circuit Court of Appeals.

The Second Circuit correctly held that, although the District Court had granted summary judgment in favor of the petitioners on the facial challenge and the parties had stipulated to nominal damages of one dollar ($1.00), there was no effective remedy the court could grant with respect to the facial claim, which was probably moot even before the District Court entertained the summary judgment motions. The Second Circuit correctly held that the complaint should be dismissed because the petitioner College Standard Magazine caused the case to become moot by its conduct in entering into the stipulation consenting to summary judgment in favor of the defendant Student Association on the as applied challenge, which was the only remaining claim.

The petition for certiorari should be denied because the Circuit Courts of Appeals, including the Second Circuit, are in agreement that a request for or an award of nominal damages does prevent a case from being moot. There is no split in the Circuit Courts of Appeals which requires resolution by this Court. Furthermore, the issue sought to be raised by the petition is not fairly presented on this record, and the decision of the Second Circuit to dismiss the case on the grounds there was no longer any case or controversy was correct.

OPINIONS BELOW

The Second Circuit's opinion is reported as College Standard Magazines v. Student Association the State University of New York at Albany, 610 F3d 33 (2d Cir. 2010). The first bench decision of the United States District Court, Northern District of New York (McAvoy, J.) dated June 13, 2005, which denied the motion and cross-motion for summary judgment by both parties [A-897-912] is unreported, and the second bench decision of the United States District Court, Northern District of New York (McAvoy, J.), dated August 8, 2005, which granted partial summary judgment to petitioners on a motion for reconsideration [A–978–987], is unreported and appears as an appendix to the petition.

STATEMENT OF JURISDICTION

The petitioners seek review of the decision of the United States Court of Appeals for the Second Circuit rendered on July 1, 2010. [See 610 F3d 33; Appendix to Petition at 1a]. The Second Circuit denied petitioners' timely petition for rehearing and rehearing en banc on September 20, 2010 [A. at 18a-19a]. The mandate issued on September 25, 2010. This Court has jurisdiction under 28 USC 1254(1). However, the Second Circuit correctly dismissed the complaint because there was no case or controversy under the United States Constitution, Article III, Section 2.

CONSTITUTIONAL PROVISIONS AND POLICY

United States Constitution Article III, Section 2 provides in relevant part: "The judicial power shall

extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority....."

COUNTER STATEMENT OF THE FACTS

College Standard Magazine, a recognized student organization (RSO) at the State University of New York of Albany, published a self-described "politically conservative" campus magazine edited by a student named Scott Barea. College Standard Magazine featured National Inquirer style journalism, for example, a lengthy article by Mr. Barea entitled "Masturbation: it's a good thing" about his personal masturbation habits, how he started at age 12, frequency, personal techniques, spanking himself, and other intimate details. [A-90, A-199, A-209][1]. During the 2002-2003 academic year College Standard Magazine applied for $5,862.05 in mandatory student activity fee money from the Student Association's budget line for "new and unfunded groups" which had only $3,500.00 available left in it [A-819-825]. While making the application, Barea threatened that if the funding request were denied he would start a lawsuit against the Student Association in federal district court for violating the constitutional rights of the conservative majority on campus [A-853-854, A-556, A-574-575].

At the time of the request in February 2003 the Student Association did not have written guidelines for funding RSOs, but relied on regulations promulgated by the State University of New York

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[1] References denoted "A" are to the Joint Appendix on appeal to the United States Court of Appeals for the Second Circuit in this case.

Board of Trustees[2] and unwritten standards and practices. RSOs which had never received funding before were generally limited to an initial funding of $350.00, and in deciding whether to grant funding the Student Association considered (1) the number of students in the RSO, (2) whether the RSO was active on campus or engaged in off-campus activities, and (3) how accessible the RSO was to students in general. Although there was no written guideline prohibiting viewpoint discrimination, the Student Association had a long history of funding a large variety of small student groups and groups representing minority viewpoints including politically conservative publications on campus [A-110-194].

On February 12, 2003 the Central Council of the Student Association voted to deny College Standard Magazine's application for funding. As threatened, Mr. Berea promptly commenced a federal civil rights action alleging two basic claims, that the Student Association's policies for awarding mandatory student activity fee money to RSOs gave the Student Association unbridled discretion to discriminate against minority viewpoints and violated the First Amendment under Board of Regents of University of Wisconsin v. Southworth, 529 US 217 (2000), and that the Student Association's vote to deny funding to College Standard Magazine on February 12, 2003 was motivated by viewpoint discrimination against politically conservative views and violated the First Amendment as applied.

In the spring of 2003 the Student Association abolished the challenged funding policy including the three unwritten guidelines it had used to allocate student activity fee money. In the fall of 2002 the

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[2] See 8 NYCRR 302.14(c)(3) [A–107–109].

University administration had brought the Southworth decision of the Supreme Court to the attention of the all-student Student Association [A-552-553, A-857-859], and the Student Association was in the process to conform its policy to the First Amendment principles defined in Southworth. On May 14, 2003 the Student Association amended its constitution and bylaws and enacted new written criteria and procedures for allocating student activity fee money to RSOS which fully complied with all of the requirements concerning viewpoint neutrality in Southworth [A-74, A-340-375, A-595-597, A-617-619]

During the 2003–2004 academic year, College Standard Magazine did not apply to the Student Association for any funding from mandatory student activity fees [A-95-96]. A full academic year passed by, with another annual budget cycle for the Student Association, without any discovery or further litigation in the District Court case.

Subsequently in May 2005 the parties cross moved for summary judgment. The issue of mootness was not raised by either party, and in fact was never raised in the District Court. On June 13, 2005 the District Court held that there had been "much debate" over whether to fund College Standard Magazine's publication at the Central Council meeting on February 12, 2003, and "a fair-minded trier of fact could conclude that [SA] had a justifiable non-content based reason for denying funding". The District Court denied the parties cross-motions for summary judgment and set the case for trial [A-907–909].

The plaintiffs moved for reconsideration, and, while the Student Association's attorney was outside the country on vacation, the District Court granted College Standard Magazine's motion for summary judgment on the first claim in the complaint, holding

that three unwritten factors the Student Association had considered in making the funding allocation decisions were unconstitutional on their face in violation of the First Amendment. Specifically, the District Court held the use of such criteria as "the number of active members in a recognized student organization, whether the recognized student organization was active on campus, how accessible the recognized student organization was to students, and whether the recognized student organization was a small group who really wanted money for a party....." could be related to speech or viewpoint discrimination, and that the Student Association's funding process therefore afforded the Student Association unbridled discretion to grant or deny access to mandatory student activity fees [A–983–985].

The District Court issued an order granting plaintiff's motion for summary judgment based on the facial challenge to the three unwritten factors the Student Association employed, but the District Court did not grant any relief. The District Court did not decide the plaintiffs' second claim, that the Student Association's vote to deny funding for College Standard Magazine on February 12, 2003 was unconstitutionally motivated, and left the challenge to the Student Association's denial of funding as applied to College Standard Magazine unresolved [A-985, A-990-991]. The Student Association filed a notice of appeal to the United States Court of Appeals for the Second Circuit [A-992-993].

Staff counsel to the Second Circuit informed the parties that the appeal was premature because the as applied challenge to the Student Association's vote was nonfinal and there was no judgment that provides for any relief, and the parties therefore stipulated to the withdrawal of the appeal as

premature [A-994–995]. After a pretrial conference on June 22, 2006 and a second pretrial conference on October 16, 2006 [A-996-999], the District Court entered an amended judgment which found the Student Association's policy was deemed unconstitutional but again did not resolve the claim challenging the Student Association's vote as applied to the denial of funding for College Standard Magazine. The judgment specifically provided ".....however, the Court did not reach a decision as to the remaining cause of action relating to the discriminatory voting practices." [A-1000].

College Standard Magazine had the option to go to trial in order to establish that the Student Association's vote to deny funding on February 12, 2003 was tainted by consideration of viewpoint discriminatory criteria or unconstitutional motivation. However, this was a burden it would have been impossible for the petitioners to sustain, because it was simply not true, and College Standard Magazine did not want to go to trial. Finally the parties entered into a Stipulation of Settlement and Order dated February 2, 2007 in which College Standard Magazine consented to entry of nominal damages of one dollar ($1.00) on the facial challenge to the three unwritten policies, and consented to entry of summary judgment in the Student Association's favor on its as applied challenge to the Central Council's vote on February 12, 2003 to deny funding for publication of the magazine. The stipulation explicitly stated that its purpose was to get a final determination on the remaining issues in the litigation so that there would be a final judgment and the case could go up on appeal [A-1003-1006].

The stipulation specifically provided for an award of nominal damages in the amount of one

dollar ($1.00) on the District Court's determination that the defendant Student Association's policies for allocating student activity fee money were unconstitutional on its face, that the stipulation as to the amount of damages was solely for the purpose of fixing the amount of damages and was not an admission of liability by the Student Association, and that ".....the purpose of this stipulation is solely to fix the amount of damages so that an amended final judgment may be issued and the constitutional issues decided in the said bench decision may be heard on appeal". Furthermore, with regard to the second claim in the complaint, whether Central Council's vote denying funding to College Standard Magazine violated the plaintiff's constitutional rights as applied, the stipulation provided that College Standard Magazine "hereby consent to entry of summary judgment in favor of defendants [Student Association]". [A-1004–1005]

The stipulation was submitted to the District Court with a cover letter stating that the purpose of the stipulation was to obtain a final judgment which would be appealable to the Circuit Court [A–1007–1009]. The District Court did not sign the stipulation, but issued another amended judgment which contained nominal damages of one dollar ($1.00) [A-1010-1013], and the Student Association filed another notice of appeal to the Second Circuit [A-1016-1017].

In their briefs both the defendant-appellant Student Association and plaintiff-respondent College Standard Magazine argued that the Second Circuit should decide the merits of whether consideration of the three unwritten factors by the Student Association violated the First Amendment on their face and allowed the Student Association unbridled discretion in allocating mandatory student activity fee

money among RSOs. The Student Association argued that the three factors -- the number of students in an RSO, whether the RSO was active on campus, and how accessible the RSO was to students -- were constitutional on their face and did not cause its decision-making to be infected by unbridled discretion. The Student Association also argued that it did not act under color of state law in distributing mandatory student activity fee money to RSOs [see Appellant's Brief and Reply Brief]. College Standard Magazine argued that the unwritten factors considered by the Student Association favored majoritarian views and imbued the Student Association with unbridled discretion to deny minority views, such as their conservative magazine, access to mandatory student activity fee money [see Respondent's Brief]. Neither Student Association nor College Standard Magazine argued mootness in their briefs to the Second Circuit, as both sides were seeking a decision on the merits of their First Amendment arguments.

The issue of mootness was raised for the first time during oral argument by the panel of the Second Circuit Judges[3]. The Circuit's decision noted that the parties' failure to raise the question of mootness in their briefs did not allow the Court to proceed because mootness is an issue of subject matter jurisdiction under Article III of the Constitution, and the courts have an independent obligation sua sponte to consider the presence or absence of a live case or controversy. College Standard Magazine v. Student Assocation of

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[3] College Standard Magazine has not provided a transcript of the oral argument in the Second Circuit with its certiorari petition. However, appellant Student Association told the Circuit Judges that this appeal was really about College Standard Magazine's effort to obtain an award of attorney fees from the students.

the State University of New York at Albany, supra, 610 F3d at 35.

The Second Circuit decision held that the Student Association's funding policy challenged by College Standard Magazine was no longer in place because the Student Association had amended its constitution in the spring of 2003 to include regulations that explicitly require viewpoint neutrality, and College Standard Magazine did not challenge the new funding policy nor argue that the former challenged policy would be reinstated. Since College Standard Magazine had stipulated to nominal damages in the total sum of $1.00 for its on the face challenge and was not seeking any injunctive relief concerning the superseded policy, the Second Circuit held that any declaration that the former Student Association funding policy was unconstitutional would be advisory only and would not provide any relief to the plaintiffs, and therefore there was no remaining dispute concerning the facial challenge to the former policy which would affect the behavior of the defendant towards the plaintiff. College Standard Magazine, supra, 610 F3d at 34-35.

The Second Circuit decision noted that after the District Court ruled in favor of plaintiff on the facial challenge, College Standard Magazine then stipulated to entry of summary judgment against them on the as applied challenge from which College Standard Magazine has not and could not appeal. By the stipulation College Standard Magazine conceded that the defendant Student Association's former funding policy had not caused the plaintiff College Standard Magazine any harm when it was in effect. College Standard Magazine, supra, 610 F3d at 34.

Further, the Second Circuit held that plaintiff College Standard Magazine had caused the case to

become moot when it entered into the stipulation consenting to summary judgment being entered in favor of the defendant Student Association on the as applied claim. College Standard Magazine, supra, 610 F3d at 36 fn. 2.

The Second Circuit concluded that plaintiff College Standard Magazine had caused the case to become moot when it entered into the stipulation consenting summary judgment be entered in favor of the defendant Student Association on the as applied claim. The only case or controversy remaining after the stipulation was the plaintiff College Standard Magazine's facial challenge to the defendant Student Association's former funding policy, which was mooted when Student Association amended its constitution in the spring of 2003.

Since the Student Association's former policy had been repealed and superseded by a constitutional funding policy, and College Standard Magazine conceded that its as applied challenge was without merit, the Second Circuit held the Court lacked jurisdiction over the appeal. "In light of the repeal of the challenged policy and the concession as to the as-applied challenge, we cannot issue a decision that would confer any relief to the plaintiffs and therefore lack jurisdiction over this appeal. [Citations omitted]". The Court dismissed the appeal as moot because it was no subject matter jurisdiction over the case under Article III. College Standard Magazine, supra, 610 F3d at 35.

Finally, the Second Circuit vacated the judgment of the District Court because the actions of the plaintiff College Standard Magazine in stipulating to the entry of summary judgment against the plaintiff on the as applied challenge had caused the appeal to become moot. When the appellee has

caused the case to become moot, the Second Circuit vacates the District Court's judgment in order to prevent the appellee from insulating a favorable decision from appellate review. College Standard Magazine, supra, 610 F3d at 36 fn. 2.

In a concurring opinion Circuit Judge Calabresi stated that the case became moot on the District Court level and should have been dismissed in the District Court. The plaintiffs' facial challenge to the Student Association's funding policy became moot when the Student Association abolished the challenged funding policy in the spring of 2003, which was before the District Court had granted summary judgment on the facial challenge to the policy in September 2005. The plaintiffs' as applied challenge to the Student Association's denial of College Standard Magazine's application for funding became moot in October 2006 when the parties entered into the stipulation consenting to entry of summary judgment in favor of Student Association, which was before the District Court entered final judgment. Since the event which caused the case to become moot happened before the entry of final judgment in the District Court, Judge Calabresi stated that the case ceased to be an Article III case or controversy and should have been dismissed as moot forthwith at the District Court level. College Standard Magazine, supra, 610 F3d at 36-37.

Judge Calabresi also stated that the fact the plaintiffs' case was moot before the District Court entered final judgment foreclosed any claim that the plaintiffs were a prevailing party entitled to attorneys fees under 42 USC 1988(b). Since the case became moot before the District Court's judgment was issued, the plaintiffs were not at that stage prevailing parties. College Standard Magazine, supra, 610 F3d

at 36-37. The Per Curiam opinion stated that the Court need not determine whether the case was moot while it was pending before the District Court, as expressed in Judge Calabresi's concurring opinion, because the judgment of the District Court was vacated on the basis of the mootness of the appeal. However, the Per Curiam decision indicated that the case "may have been" moot while it was pending before the District Court, and, if it was, the court "would also be required to vacate the district court's decision for that independent reason". College Standard Magazine, supra, 610 F3d at 36 fn. 1. Accordingly, the other members of the Second Circuit panel were in agreement with the concurring opinion.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS WHICH MERITS REVIEW BY THIS COURT

The petitioners' argument for granting certiorari is based on a fundamental misunderstanding of the Second Circuit's decision, or an intentional effort to conjure up a conflict amongst the Circuit Courts of Appeals decisions where none exists. In either event, the petition should be denied.

The petitioners' argument -- that the Second Circuit in this case adopted the view that the award of nominal damages is insufficient to prevent mootness -- is a misreading of the decision below. The decision of the Second Circuit in this case never states that the award of nominal damages on the facial challenge to the Student Associations' funding policy mooted the appeal.

The decision of the Second Circuit is explicit that the event which mooted the facial challenge to the Student Association's funding policy occurred in the spring of 2003 when the Student Association abolished the former unwritten funding policy and changed its constitution and policy governing the award of mandatory student activity fee money to RSOs in order to comply with Southworth. Since the Student Association abolished the challenged funding policy two years before the District Court granted summary judgment in August 2005, the petitioners' facial challenge to the funding policy was moot at the District Court level years before the District Judge ruled on the merits of the claim. But the appeal would still have been a live case or controversy under Article III if the petitioners' claim regarding the as applied challenge had continued.

As the Second Circuit correctly held, the event which mooted the appeal was when the petitioner College Standard Magazine stipulated that the as applied challenge to the Student Associations vote on February 12, 2003 to deny petitioners' application for funding was without merit. College Standard Magazine's petition to this Court glaringly omits the stipulation it entered into in the District Court which mooted the appeal. The stipulation plainly provides that with regard to the claim in the complaint that the denial of funding violated the plaintiff's constitutional rights, on which the District Court did not reach any decision on the motion for summary judgment, the plaintiffs College Standard Magazine consents to entry of summary judgment in favor of the defendant Student Association [A-1005]. Since there were only two claims in the complaint, a challenge to the Student Association's funding policy on its face and as applied, and since the facial claim was mooted

when the Student Association superseded its former policy, the Second Circuit correctly held that it was this second event which mooted the appeal and the case.

The petitioners' argument is based on a flawed misreading of the Second Circuit decision. The petition claims the Second Circuit in this case "adopted the contrary view that the award of nominal damages is insufficient to prevent mootness". The Second Circuit decision in this case does not make that holding, and does not support that proposition. The event which caused mootness on petitioners' facial claim was not the stipulation of nominal damages on the facial claim, but the repeal of the unwritten funding policy and adoption of constitutional changes in the Student Association's funding policy which explicitly requires viewpoint neutrality and complies with Southworth, an event which occurred two years before the stipulation. "But the funding policy challenged by the plaintiffs is no longer in place at SUNY Albany. The Student Association amended its constitution in the spring of 2003 to include regulations on funding that explicitly require viewpoint neutrality..... We are thus asked to consider the constitutionality of a funding policy that is no longer in effect, and that is not alleged to have caused the plaintiffs harm when it was in effect. This we cannot do." College Standard Magazine, supra, 610 F3d at 34.

According to the Second Circuit's decision in this case, the facial challenge may have became moot when the Student Association amended its constitution to comply with Southworth in the spring of 2003. According to the concurring opinion, the facial challenge definitely became moot at that time. The real issue is whether the parties failure to raise

mootness in the District Court and subsequent stipulation to nominal damages can revive the petitioners' facial claim and somehow give it new life, even though there was no longer an Article III case or controversy about the facial claim. The Second Circuit correctly held that the answer is clearly "no".

The effect of the stipulation, consenting to summary judgment in favor of Student Association on the as applied claim, which the petitioners downplay and even omit to attach to the petition, was to moot the second claim regarding the petitioners' as applied challenge to the Student Association's vote on February 12, 2003 to deny funding for College Standard Magazine's publication. According to the Second Circuit decision, it was this event that made the appeal moot because then all claims stated in the complaint were both moot.

The petitioners' argument that in this case the Second Circuit has sided with other Circuit Courts of Appeals in holding that an award of nominal damages is insufficient to produce mootness, and that the Second Circuit's decision in this case creates a "split" in the Circuits, is simply false.

The Second Circuit has always held that an award of injunctive relief or nominal damages is sufficient to prevent mootness. Van Wie v. Pataki, 267 F.3d 109, 115 fn. 4 (2d Cir. 2001) ("We note that had the plaintiff sought money damages in addition to their request for injunctive relief, this controversy would not be moot. Indeed, for suits alleging constitutional violations under 42 U.S.C. s 1983, it is enough that the parties merely request nominal damages."); Dawes v. Walker, 239 F3d 489, 497 (2d Cir. 2001)(Walker, C. J., writing separately); Diesel v. Town of Lewisboro, 232 F3d 92, 108 (2d Cir. 2000). There is nothing in the decision in this case to hint of

a change in the Second Circuit's long-standing law that a claim for nominal damages is sufficient to avoid mootness.

The petitioners' argument, that the Courts of Appeals have become "deeply divided" over whether the availability of nominal damages prevents a case from being moot, is a strawman which petitioners have conjured up. In point of fact the Second Circuit's stance is identical to the Third, Fourth, Fifth, Eighth, Ninth, and Tenth Circuit Courts of Appeals in holding that a claim for nominal damages is sufficient to present a case or controversy under Article III for judicial review in the district court and appellate levels. The petitioners' argument that the Courts of Appeals have "disagreed" over this issue is disingenuous and contrived to entice this Court to grant certiorari to resolve a difference in the Circuits which does not exist. There is no majority rule and minority rule, the law is absolutely clear in all the Circuit Courts of Appeals that a claim for nominal damages does prevent mootness.[4]

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[4] The petitioners' argument that the Sixth Circuit has adopted a rule contrary to all of the other Circuits, based on the decision in one case, Morrison v. Board of Education of Boyd County, 521 F3d 602 (6th Cir. 2008), is extremely doubtful. In numerous cases the Sixth Circuit has held or indicated that a claim for nominal damages is sufficient to preclude a finding of mootness. See Morrison, supra, 520 F3d at 615 (Moore, J., dissenting [collecting cases]). The majority decision in Morrison holds that the plaintiff had no standing because there was no actual chill or injury-in-fact under the First Amendment. Morrison, supra, at 608- 611. As an alternative ground for dismissal, the majority discusses the issue of "redressability" of whether nominal damages would redress the plaintiffs' alleged injury. However, the underlying fact of this discussion seems to be that the school board's policy was no longer in existence and therefore the claim

The petitioners' argument that the decision of the Second Circuit has "pernicious effects" in First Amendment cases where the government possesses unbridled discretion to determine access to a forum is completely erroneous. College Standard Magazine's petition to this Court is not about any injury to petitioners, because College Standard Magazine has conceded that there was no injury, but is really about attempting to bludgeon college students with large counsel fee awards cases by invoking 42 USC 1988(b) in meritless civil rights litigation. Petitioners' argument that they were without the ability to prove actual viewpoint discrimination [see Petition at p.15] should be regarded as a further admission, in addition to the stipulation consenting to summary judgment in favor of the Student Association on the as applied claim, that their case had no merit from the beginning.

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for nominal damages was moot. See Morrison, supra, at 610-611. As pointed out by the dissenting opinion, "I think the majority opinion mistakenly camouflages a belief that the case is moot in a discussion of redressability, resulting in an opinion that misinterprets standing doctrine and is silent with respect to relevant precedent concerning mootness doctrine." Morrison, supra, at 622-623 (Moore, J., dissenting). In subsequent cases the Sixth Circuit has held that a claim for nominal damages based on a constitutional violation does prevent mootness on appeal. Pagan v. Village of Glendale, 559 F3d 477 (6th Cir. 2009). It appears that the majority decision in Morrison may simply be an erroneous deviation from the rule in the Sixth Circuit. Regardless, if the Sixth Circuit has adopted erroneous rule, there is no reason to grant certiorari in this case where the Second Circuit has ruled correctly and consistently with the other Circuits and with the precedents of this Court.

College Standard Magazine's argument in their certiorari application that the Second Circuit's decision "essentially allow[s] governmental officials to use the judicial system to gauge the lawfulness of policy, and then at the last second moot the challenge by amending the offending policies" [see Petition at p.16] is certainly not what happened in this case. The facial challenge was clearly moot by May 14, 2003 when the Student Association amended its funding policy [A-74, A-340-375, A-595-597, A-617-619]. The facial challenge was clearly moot before the District Court issued a ruling denying the plaintiff College Standard Magazine's motion for a preliminary injunction on June 9, 2003, because the Student Association had already abolished the prior unwritten policy on earlier in the spring of 2003.

College Standard Magazine's argument is spurious. Although the District Judge was made aware that the facial challenge was moot, and he acknowledged that Student Association's policy had been changed before granting summary judgment [A-904], the defendant Student Association did not attempt to duck a decision on the merits of the First Amendment claims. The defendant Student Association never raised the issue of mootness in either the District Court nor the Second Circuit because the Student Association wanted a ruling on the merits. The Student Association was also prepared to go through trial of the as applied claim, but the plaintiff College Standard Magazine wanted to avoid a trial and entered into the stipulation consenting to summary judgment in favor of the defendant Student Association.

The image the petitioners seek to create, that the Student Association suddenly repealed the challenged policy "at the last second" in order to moot

this case, is completely false and misleading. The Student Association abolished the challenged funding policy in the spring of 2003, more than two years before the cross-motions for summary judgment. During that two-year period, the petitioner College Standard Magazine sat on its hands and never applied for additional funding and did little or nothing to move the case forward to final judgment. When confronted with a trial, College Standard Magazine opted to moot out their remaining as applied claim by entering into the stipulation admitting summary judgment in favor of the Student Association.

Throughout the litigation the Student Association sought a ruling on the merits that it was not a state actor and, if it was a state actor, that its written and unwritten policies were consistent with the First Amendment and its denial of funding to College Standard Magazine had been made on a content neutral basis. The defendant Student Association sought a decision on the merits in order to define its obligations under the First Amendment in allocating mandatory student activities fee money to RSOS. The Second Circuit sua sponte raised the issue of mootness at oral argument for the first time. The petitioners' real complaint is that the Second Circuit enforced the case or controversy requirement in Article III and refused to issue an advisory opinion, or perhaps their real complaint is that they don't like the decision of this Court in Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 US 598, 606 (2001).

II. THE PETITIONERS' CLAIM IS BARRED BY THE BUCKHANNON DECISION

Although the petition for certiorari bemoans the plight of plaintiffs who are barred by the so-called minority rule from vindicating their constitutional rights "because defendants may dodge both judgment and [attorneys] fees by eleventh hour evasive maneuvers" [Petition at pp.13-14], even if the non-existent minority rule were in effect, the petitioners do not face this problem because in this case College Standard Magazine could not recover their costs and attorneys fees based on Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 US 598, 606 (2001).

Buckhannon established that the fee shifting provisions, which permit courts in their discretion to award reasonable attorney's fees to the prevailing party, may not be awarded based on the catalyst theory, simply because the plaintiff achieves the desired result where the defendant government enacted a voluntary change in the defendant's conduct. Buckhannon, supra, 532 US at 601-602, 606. One of the reasons why the catalyst theory was rejected was in order to avoid a litigation within a litigation over the motivation for the government's change in policy so that a plaintiff could obtain an award of attorney's fees. The Buckhannon decision held that a request for attorney's fees should not result in a second major litigation to determine the motivation for a government's change in policy. Buckhannon, supra, 532 US at 609-610.

The petitioners claim that "The catalyst theory is not at issue here" [Petition at p. 17] is flatly wrong. The exact opposite is true. The sole reason the petitioners are pursuing certiorari is to attempt to

trivialize Buckhannon and open up government to awards of attorneys fees in cases which are truly moot. In this case, the petitioners seek to penalize the Student Association by forcing the students to pay College Standard Magazine's attorneys fees.

However, an award of attorney's fees would clearly be barred to petitioners under Buckhannon. In order to obtain an award of attorney's fees, the petitioners would have to establish that their lawsuit caused the Student Association to change its policy in the spring of 2003. This would be an impossible burden for the petitioners to prove, since it would not be true.

The record shows that prior to commencement of the lawsuit, in the fall of 2002 the University administration at the State University at Albany had informed the students on the Student Association's executive committee of the Southworth decision and the need for the Student Association to allocate mandatory student activity fee money on a content neutral basis [A-552-553, A-857-860], and the process of amending the Student Association's constitution and policies had already begun. The Student Association amended its constitution in the spring of 2003, shortly after the administration had alerted the Student Association to Southworth and coincidentally shortly after petitioner Barea followed through on his threat to sue the Student Association. In order for the petitioners to obtain an award of attorney's fees, College Standard Magazine would have to prove that it's lawsuit had motivated the Student Association to amend its constitution. This would require a hearing involving a three-part test: whether College Standard Magazine's claim was colorable rather than groundless, whether the lawsuit was a substantial rather than an insubstantial cause of the defendant's

change in conduct, and whether the defendant's change in conduct was motivated by the plaintiffs threat of victory rather than threat of expense. See Buckhannon, supra, 532 US at 610. This is precisely the inquiry which Buckhannon forbids. Since the petitioners are barred from recovering attorneys fees even if they were to win the appeal on the merits, in this respect there is no actual case or controversy under Article III for this Court to consider on certiorari.

III. THE PETITIONER'S HAVE WAIVED THEIR RIGHTS TO CLAIM ANY INJURY AND HAVE NO STANDING

Even if there were a disagreement among the Circuits, which there is not, the petitioners have waived their rights and have no standing because College Standard Magazine has stipulated that it was not injured and sought to appeal solely in order to get a decision on the merits in which, since they were not successful in obtaining a decision on the merits, they did not prevail. Finally the petitioners failed to raise the argument concerning Article III standing now made in their petition before the Second Circuit. Having failed to make their arguments that nominal damages do prevent mootnes in the Second Circuit, the petitioners have waived this point by failing to preserve this argument for review in this Court.

CONCLUSION

For the foregoing reasons, respondent respectfully urges this Court to deny certiorari.

Dated: Albany, New York
March 21, 2011

Respectfully submitted,
/S/

Lewis B. Oliver, Jr. Esq.
Counsel for Respondents
Oliver Law Office
156 Madison Avenue
Albany, New York 12202

APPENDIX

STIPULATION OF SETTLEMENT AND ORDER.....2a

LETTER BRIEF TO HON. THOMAS J. McAVOY.....6a

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

COLLEGE STANDARD MAGAZINE, JEFFREY SCOTT BAREA, AND JULIEN A.M. STARR,

Plaintiffs

-against-

STATE UNIVERSITY OF NEW YORK AT ALBANY, AND THE STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK AT ALBANY,

Defendants.

STIPULATION OF SETTLEMENT AND ORDER

CIVIL ACTION NO.
03-CV-0505

HON. THOMAS J. McAVOY

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, as follows:

1. The parties stipulate and agree that, with regard to the claim in the complaint that the defendant Student Association's policies for allocating mandatory student activity fee money to recognized student groups in effect on February 14, 2003 were unconstitutional on its face, the plaintiffs are entitled to an award of nominal damages in the amount of one dollar ($1.00)

upon the Court's determination set forth in the transcript of the Court's bench Decision on June 3, 2005 at pages 6 to 8. Notwithstanding plaintiffs consent to summary judgment in favor of defendants on the separate claim set forth in paragraph 3 below, plaintiffs reserve the right to argue that the facts surrounding the February 13, 2003 vote denying funding illustrates bow defendants' policies were unconstitutional on its face as set forth in the bench Decision; and

2. The parties stipulate and agree that the stipulation as to the amount of damages in paragraph 1 above is solely for the purpose of fixing the amount of damages upon the Court's bench Decision on June 13, 2005. This stipulation of settlement is not an admission of liability by the Student Association, or an admission that the Court's Decision on the motion for summary judgment as to the Student Association's written and/or unwritten policies was correct, and the purpose of this stipulation is solely to fix the amount of damages so that an amended final judgment may be issued and the constitutional issues decided in the said bench Decision may be heard on appeal; and

3. The parties stipulate and agree that, with regard to claim in the complaint that the denial of funding to the plaintiff College Standard Magazine by the vote of Central Council of the Student Association on February 14, 2003 violated the plaintiff's constitutional rights on which the Court did not reach any decision on the motion for summary judgment the plaintiffs hereby consent to entry of summary judgment in favor of defendants; and

4. The Court reserves decision on the issue of attorneys fees to be decided at a later time; and

5. The parties jointly request the Court to enter an amended final judgment amending the Judgment in a Civil Case dated October 18, 2006 and disposing of this case based on the stipulation herein.

DATE: February 2, 2007

/S/
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DATE: February 1, 2007

/S/
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ORDER

This Court, having held conferences in Chambers in Albany with the attorneys for both parties present on June 22, 2006, and on October 11, 2006, and having heard the attorneys for all parties, hereby finds that on the motion for summary judgment the Court did not reach a decision whether the unconstitutional policies of the Student Association were the cause in fact or proximate cause of the Central Council vote to deny funding for plaintiffs on February 14, 2003, and hereby approves the Stipulation of the parties which fixes the amount of damages on the claim decided in the bench Decision on June 13, 2005 and consents to entry of summary judgment in favor of defendants on the claim that was not decided in the
bench decision, and hereby directs the Clerk to enter an amended final judgment accordingly.

IT IS SO ORDERED:

DATE

HON. THOMAS J. MCAVOY
Senior United States Judge
Northern District of New York

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February 2, 2007

Hon. Thomas J. McAvoy
United States District Court,
Northern District of New York
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Binghamton, New York 13901
Attn: Colleen Ligas

VIA ELECTRONIC FILING
(www.nynd.uscourts.gov)

Re: College Standard Magazine. Jeffrey Scott Barea, and Julien A.M. Starr v. State University of New York at Albany, and the Student Association of the State University of New York at Albany - United States District Court, Northern District of New York
Civil Action No. 03-CV-050S (McAvoy) (Treece)

Your Honor:

I represent the defendant Student Association in the above-entitled matter. This is to respectfully request that Your Honor review the attached

Stipulation of Settlement and Order and, if it should meet with your approval, execute the proposed Order.

As you will recall in a conference in 2005 Staff Counsel to the United States Court of Appeals for the Second Circuit advised the parties that the judgment was non-final and therefore an appeal was premature, and the parties had difficulty in reaching an agreement that would finalize the case. Your Honor held two conferences including the second one in Chambers in Albany on October 11, 2006, and we believed we had reached an agreement that finalized all issues so that we could appeal to the Second Circuit to clarify the constitutional questions raised. The Clerk entered the Judgment in a Civil Case dated October 18, 2006.

Upon review of the Judgment in a Civil Case, Thomas J. Marcelle, Esq., attorney for the plaintiffs, and I believe that the judgment still contains a problem in that it appears to be nonfinal and therefore not appealable. We have again discussed this matter extensively, and we have agreed upon the enclosed Stipulation of Settlement and order. We have executed the stipulation, the original of which is in closed. We believe the proposed stipulation accurately characterizes the bench decision of the Court and solves the problem of finality of all claims, while protecting other interests that have concerned the parties.

Accordingly, Mr. Marcelle and I jointly request that Your Honor review the proposed Stipulation of Settlement and Order and approve same if it is satisfactory to the Court. The Order if approved would direct the Clerk to enter an amended judgment. If Your Honor requires any further information or

directs that changes be made in the Order, of course we will be glad to comply.

Thank you for your consideration and assistance in this matter.

Respectfully submitted,

/S/

Lewis B. Oliver, Jr., Esq.

LBOJ/ms
enc.

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185 (3)

No. 10-822

SUPREME COURT, U.S.
FILED
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OFFICE OF THE CLERK

In the
Supreme Court of the United States

COLLEGE STANDARD MAGAZINE, JEFFREY SCOTT BAREA, and JULIEN A.M. STARR,
Petitioners,

v.

STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK AT ALBANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Petitioners Jeffrey Scott Barea and Julien A.M. Barr are individuals.

Petitioner College Standard Magazine is an unincorporated association.

TABLE OF CONTENTS

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

I. Procedural History of the Case 1

II. The Courts of Appeals have become deeply divided over whether the availability of nominal damages prevents a case from becoming moot. 3

A. The Second Circuit held that plaintiffs' stipulated nominal damages are insufficient to prevent mootness. 4

B. Even if the Second Circuit held that nominal damages are unavailable for facial challenges, such a holding is at odds with this Court's precedent and deepens a circuit split 7

C. Until the issue is resolved parties (in circuits that have wrongly decided the issue) are being forced unjustly to bear risks and costs of litigation that they should not. 11

D. In the decade since this Court's decision in Buckhannon the question whether nominal damages prevent a case from becoming moot, where the government has changed or repealed an alleged unconstitutional policy, has come strikingly to the fore.....12

CONCLUSION.....13

APPENDIX B

Decision of the U.S. District Court for the Northern District of New York (June 13, 2005) (Transcript of Proceedings containing decision.).....1b

Decision of the U.S. District Court for the Northern District of New York (February 6, 2007).....13b

TABLE OF AUTHORITIES

CASES:

Advantage Media, L.L.C. v. City of Eden Prairie,
456 F.3d 793 (8th Cir.2006) 10

Amidon v. Student Association of State University of New York at Albany,
508 F.3d 94 (2nd Cir. 2007) 1

Board of Regents of the University of Wisconsin v. *Southworth*,
529 U.S. 217 (2000) 2, 6

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources,
532 U.S. 598 (2001) 8-9, 12-13

Carey v. Piphus,
435 U.S. 247 (1978) 8

City of Lakewood v. Plain Dealer Publishing Company,
486 U.S. 750 (1988) 6

Committee for the First Amendment v. Campbell,
962 F.2d 1517 (10th Cir.1992) 9

Davis v. Village Park II Realty Company,
578 F.2d 461 (2nd Cir. 1978) 5

Forsyth County, Georgia. v. Nationalist Movement,
505 U.S. 123 (1992) 6, 8

Freedom From Religion Foundation, Inc. v. City of Green Bay,
581 F.Supp.2d 1019 (E.D.Wis. 2008). 4, 7

Hernandez v. European Auto Collision, Inc.,
487 F.2d 378 (2nd Cir. 1973).....5

Memphis Community School District v. Stachura,
477 U.S. 299 (1986).....8

*Morgan v. Plano Independent School Dist*rict,
589 F.3d 740 (5th Cir. 2009).....4-5

Morrison v. Board of Education of Boyd County,
521 F.3d 602 (6th Cir. 2008).....4, 7

Rock for Life-UMBC v. Hrabowski,
2010 WL 5189456 (4th Cir. 2010) 11

Rosenberger v. Rector and Visitors of the University of Virginia,
515 U.S. 819 (1995).....2

Utah Animal Rights Coalition v. Salt Lake City Corporation,
371 F.3d 1248 (10th Cir. 2004).....4, 9

Virdi v. Dekalb County School District,
216 Fed.Appx. 867 (11th Cir. 2007) 9-10

Yniguez v. Arizona,
975 F.2d 646 (9th Cir. 1994).....10

Yniguez v. Arizonans for Official English,
69 F.3d 920 (9th Cir. 1995).....10

INTRODUCTION

In opposition, defendant argues that the Second Circuit correctly held that nominal damages are unavailable for facial challenges because plaintiffs suffered no harm under the policy. Petitioners were harmed by defendant's viewpoint discriminatory policy. Defendant changed its policy after the students-plaintiffs had paid their mandatory student fees, after their fees were distributed pursuant to the policy, and after plaintiff-CSM was denied funding. Moreover, whether the Second Circuit held that nominal damages are insufficient to moot a case or that nominal damages are unavailable in facial challenges, is of no great moment — under either holding a circuit split is created. In the end, defendant's reasons to deny the petition for certiorari are unpersuasive.

I. Procedural History of the Case.[1]

The SUNY Student Association ("SA" or "defendant") compelled students to pay it to fund speech by student groups.[2] The SA can force students like plaintiffs, Scott Barea and Julien

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[1] Defendant's recitation of the facts and procedural posture is inaccurate. Instead of correcting every error, petitioners will refocus on the relevant and correct history of the case.

[2] "Every semester, SUNY-Albany collects a mandatory student activity fee of $80 from each student . . . . A student who fails to pay this mandatory fee cannot register for classes and has his transcript withheld." *Amidon v. Student Ass'n of State University of New York at Albany*, 508 F.3d 94, 95 (2nd Cir. 2007).

Starr, to give their money to support speech of other students. *Board of Regents of the University of Wisconsin* v. *Southworth*, 529 U.S. 217 (2000). The SA fund is, however, a public forum; access to those funds is governed by "the same principles that are applicable [to physical fora.]" *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995). To be more precise, the First Amendment requires viewpoint neutral decision making by the SA. *See Southworth*, 529 U.S. at 235.

It was undisputed that Barea and Starr paid their $80.00 fee and were students at SUNY Albany in good standing. JA 287.[3] It is also undisputed that CSM was a recognized student organization ("RSO") eligible for funding. JA 291.

Both parties cross-moved for summary judgment. The district court denied both motions. First, the district court denied defendant's motion — "A fair-minded trier of fact could conclude that plaintiffs were denied funding because of the contents of their publication." App. B at 8b.[4] However, despite the comments of several council members that demonstrated viewpoint basis, the district court required the plaintiffs to prove that a

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[3] "JA" refers to the joint appendix submitted by the parties to the Second Circuit.

[4] Appendix B is attached to hereto and it consists of the initial decision by the district court to deny both the cross-motions for summary judgment (1b-12b) and the amended final judgment (13b-14b).

majority of members voted not to fund CSM because of its viewpoint. App. B at 9b-10b.[5]

Instead of litigating the intentions of individual SA members, CSM conceded the as applied challenge because CSM could not produce evidence in light of the SA's refusal to provide reasons for its denial of funding. Plaintiffs chose to challenge the constitutionality of a policy that imbued the SA with unbridled discretion.

Upon plaintiffs' motion for reconsideration, the district court found that the SA's policy was inherently viewpoint biased on its face. Both parties stipulated that all plaintiffs suffered nominal damages. App. A. at 11a.[6]

II. The Courts of Appeals have become deeply divided over whether the availability of nominal damages prevents a case from becoming moot.

Defendant argues that the Second Circuit did not hold that nominal damages are insufficient to prevent mootness but rather that nominal damages are unavailable in facial challenges. Even if

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[5] One critical, pivotal and undisputed fact important to understanding subsequent events in the case is that the SA did not explain funding decisions. The SA admitted that "it [was not required to] provide an explanation for approving or rejecting funding for a particular recognized student organization ... ." JA 299 at ¶70]. Thus, SA's policy allowed it to deny a student group funding for any reason (App A. at 11a) and then not provide reasons for the denial.

[6] Appendix A is contained in the Petition for Writ of Certiorari.

defendant's interpretation is correct and the Second Circuit held that a request for nominal damages is unavailable for a facial challenge, such a holding calls into question precedent from this Court and deepens a circuit split on the issue.

In the end, whether nominal damages are unavailable for facial challenges or nominal damages are insufficient to prevent mootness because the award of nominal damages is equivalent to a declaratory judgment,[7] the result is still the same — the government can moot a case with a change of policy. Thus, no matter how the Second Circuit opinion is interpreted, the circuits are split on either interpretation.

These issues have been percolating in the Circuits for more than a decade, if not longer. It has become a problem in the vast area of §1983 litigation that needs to be addressed. *See* Petition at p. 12-16 (discussing the problems associated with this circuit split).

A. The Second Circuit held that plaintiffs' stipulated nominal damages are insufficient to prevent mootness.

Initially, defendant incorrectly argues that the Second Circuit has been clear that nominal damages suffice to prevent a case from becoming moot. As recently noted by the Fifth Circuit, *Morgan v. Plano*

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[7] *See e.g., Utah Animal Rights v. Salt Lake City Corp.*, 371 F.3d 1248, 1268 (McConnell, J. concurring); *Morrison v. Board of Educ. of Boyd County*, 521 F.3d 602, 611 (6th Cir. 2008); *Freedom From Religion Foundation, Inc. v. City of Green Bay*, 581 F.Supp.2d 1019, 1031-1032 (E.D.Wis. 2008).

Independent School Dist., 589 F.3d 740, 749 n. 32 (5th Cir. 2009), the Second Circuit has taken inconsistent positions on the issue. *Compare Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 387 (2nd Cir. 1973) (holding that a claim for nominal damages does not avoid mootness), *with Davis v. Village Park II Realty Co.*, 578 F.2d 461, 463-64 (2nd Cir. 1978) (holding that the availability of either nominal or substantial damages was sufficient to avoid mootness).

Next defendant argues that the Second Circuit held that plaintiffs suffered no harm and therefore nominal damages were unavailable. Defendant premised its argument on its interpretation of the part of the opinion which states that "[a]nd we could not order damages for any harm the policy inflicted on the plaintiffs because the as-applied challenge has been conceded. Any declaration that the policy was unconstitutional would be strictly advisory." 4a.

Defendant's interpretation cannot be correct. Plaintiffs were harmed by an unconstitutional system. The student-plaintiffs were required to pay into a facially unconstitutional system, their fees were distributed under that system, and CSM was denied funding under the policy that was inherently viewpoint biased. The suit was brought to redress these past harms.[8] Plaintiffs, both the students and CSM, were injured by the policy before it was altered and the alteration of policy did not wipe the slate for

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[8] Student-plaintiffs as fee payers were harmed differently than CSM. Curiously defendant never mentions the student-plaintiffs and never references the harm caused to them by the SA's unconstitutional system.

the past wrongs — defendant recognized this, the SA stipulated to the fact all plaintiffs suffered damages!

Moreover, the old policy violated the First Amendment. The policy vested defendant with unbridled discretion when deciding access to funding. Being subjected to unbridled discretion in the decision making process and having one's mandatory fees distributed through such a system is a constitutional harm, even if a particular funding decision is correct. It is the lack of standards in deciding access to the forum that violates the First Amendment,[9] not necessarily the results. *See Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133, n. 10 (1992) (noting that facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision).

The very vice of unbridled discretion is that it allows the government to conceal viewpoint discrimination. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988). Thus, in an unbridled discretion regime, damages from actual viewpoint discrimination are usually unprovable. Therefore, the appropriate expression of harm in an unbridled discretion case is generally the award of nominal damages.

Defendant acknowledged this harm — it stipulated to damages. Thus, when the Second Circuit said that it could "not order damages for any

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[9] This includes not only the rights of those seeking funding but also the students forced to provide the funding. *Southworth*, 529 U.S. at 235.

harm the policy inflicted on the plaintiffs because the as-applied challenge has been conceded," it meant that plaintiffs suffered no quantifiable compensatory damages under the policy, not that they lacked actual past redressable harm under the old policy which could be compensated by nominal damages. App. A at 4a.

The proper interpretation of the Second Circuit's decision is plaintiffs' award of nominal damages was insufficient to prevent the case from becoming moot in light of the changed policy. As explained in detail in the plaintiffs' petition (p. 5-11), the majority of the Courts of Appeals have held that the repeal of an unconstitutional law does not erase the slate and the award of nominal damages avoids mootness — two Circuits, the Sixth (*Morrison v. Board of Educ. of Boyd County*, 521 F.3d 602, 611 (6th Cir. 2008)) and the Second have departed from the majority rule.[10]

B. Even if the Second Circuit held that nominal damages are unavailable for facial challenges, such a holding is at odds with this Court's precedent and deepens a circuit split.

Even if defendant's interpretation is correct and the Second Circuit held that a request for nominal damages is unavailable for a facial challenge, such a holding calls into question precedent from this Court and deepens a circuit split on the issue.

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[10] *See also Freedom From Religion Foundation, Inc.* 581 F.Supp.2d at 1031-32 (adopting the Sixth Circuit reasoning).

Although this Court has not dealt with this precise issue, it has held that nominal damages are available where a lawful result is reached but an unconstitutional policy is employed. The Court, in a student suspension case, held that even if "suspensions were justified, respondents nevertheless will be entitled to recover nominal damages . . ." because the process by which the students were suspended was unconstitutional. *Carey v. Piphus*, 435 U.S. 247, 267 (1978).

In other words, even if the decision is right, but the process is unconstitutional, §1983 plaintiffs still are entitled to nominal damages. *Carey's* logic applies with equal force in the arena of the First Amendment. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 309 (1986); *Cf. Forsyth County*, 505 U.S. at 133, n. 10 (noting that facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision). Thus, even if the SA did not deny CSM funding based on its viewpoint, but subjected CSM to an unconstitutional viewpoint discriminatory system (right decision, illegal process), nominal damages are available under this Court's precedent.

If the Second Circuit prevents plaintiffs like CSM (not to mention the student-plaintiffs who were forced to pay into an unconstitutional system and then had their fees distributed via the unconstitutional system) from recovering nominal damages in a facial challenge, then *Carey* has been seriously eroded. *Cf. Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 608-609 (2001)

(presuming nominal damages would be available in cases like this — "[any] fear of mischievous defendants [who would moot a claim by a belated change in policy] only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case.").

If defendant is right and the Second Circuit held that neither the student-plaintiffs nor CSM were entitled to nominal damages, then the Second Circuit holding conflicts with the majority of circuits. The Tenth, Eleventh, Eighth and Ninth Circuits have held that nominal damages are available for facial challenges.

In *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004), protesters brought an action against city defendants, raising facial challenges to the process for obtaining a permit to demonstrate. The City amended the ordinance. The district court dismissed the case as moot. The protesters appealed arguing that a request for nominal damages prevented their facial claim from being declared moot. *Id.* at 1258, n. 3. The Tenth Circuit found the facial claim justiciable and reached the merits of the facial claim. *See also, Comm. for the First Amendment v. Campbell,* 962 F.2d 1517, 1526 (10th Cir.1992).

Likewise, the Eleventh Circuit determined that nominal damages are available in facial challenges. In *Virdi v. Dekalb County School Dist.*, 216 Fed.Appx. 867, 872-873 (11th Cir. 2007) a student had challenged a university system of racial preferences as applied and on its face. The Court

dismissed the as applied challenge but held that the policy was facially unconstitutional. The Eleventh Circuit found that the student was entitled to nominal damages on his facial claim. *Id.* at 873.

Similarly, in *Advantage Media, L.L.C. v. City of Eden Prairie,* 456 F.3d 793, 801 (8th Cir.2006), the Eighth Circuit concluded that the city reached the correct in denying plaintiff a sign permit. Nevertheless, even assuming "the substantive provisions of the sign code ... constitutional," plaintiff would "be entitled to nominal damages if it could show that it was subjected to unconstitutional procedures." *Id.* at 803. The primary procedural deficiency which [plaintiff alleges] is the supposedly unbridled discretion city officials had ... to deny [sign] applications." *Id.* at 804. The request for nominal damages would prevent mootness even though the "the deficiencies [plaintiff] alleges were remedied after this action commenced." *Id.* at 803.

In a series of opinions, the Ninth Circuit held that a plaintiff who makes a facial challenge to a statute is entitled to nominal damages. *Yniguez v. Arizona,* 975 F.2d 646, 647 (9th Cir. 1994). *See Yniguez v. Arizonans for Official English,* 69 F.3d 920, 949 (9th Cir. 1995) rev'd on other grounds by *Arizonans for Official English v. Arizona,* 520 U.S. 43 (holding that an award of nominal damages ... is singularly appropriate in First Amendment overbreadth cases).

In contrast, the Fourth Circuit recently reached the opposite conclusion. Among other claims, a group of students brought a facial challenge to a university policy that gave the

university unbridled discretion in determining access to the forum. Plaintiffs alleged that the unbridled discretion chilled their speech and sought declaratory relief and nominal damages. The university amended its policy. The Fourth Circuit dismissed the case because "the plaintiffs' facial challenge to the policy is moot notwithstanding the fact that it seeks the recovery of damages rather than injunctive relief." *Rock for Life-UMBC v. Hrabowski*, 2010 WL 5189456, 8 (4th Cir. 2010).

Even if defendant's interpretation is correct and the Second Circuit has held that a request for nominal damages is unavailable to plaintiffs who make a facial challenge to a policy, such a holding calls into question precedent from this Court and deepens a circuit split on the issue.

C. Until the issue is resolved, parties (in circuits that have wrongly decided the issue) are being forced unjustly to bear risks and costs of litigation that they should not.

In the end, whether the Second Circuit (like the Fourth Circuit) says that nominal damages are not available for facial challenges or it (like the Sixth Circuit) says that nominal damages do not prevent mootness because the award of nominal damages is a declaratory judgment, the result is still the same — the government can moot a case with a change of policy. To say that only declaratory relief and not nominal damages are available in a facial challenge, or to say that the award of nominal damages is the

equivalent to a declaratory judgment is to say the same thing in this context.[11]

These issues have been percolating in the Circuits for more than a decade, if not longer. It affects a host of cases and has become a problem that needs to be addressed. It is unfair to one side — either cases like this one should be dismissed as moot or plaintiffs, like petitioners here, should prevail and be awarded nominal damages together with their fees and costs. Either governments are paying when they should not have to, or plaintiffs are being denied their costs and fees when they deserve to be reimbursed. Until the issue is resolved, parties (in circuits that have wrongly decided the issue) are being forced unjustly to bear risks and costs of litigation that they should not. An unclear rule invites a waste of resources. Both questions are fairly presented on this record and petitioners ask this Court to grant certiorari.

D. In the decade since this Court's decision in *Buckhannon* the question whether nominal damages prevent a case from becoming moot, where the government has changed or repealed an alleged unconstitutional policy, has come strikingly to the fore.

Defendant mistakes plaintiffs' argument concerning *Buckhannon*. The catalyst theory is not at issue here. Rather the elimination of that theory

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[11] Moreover, the issue of the availability of nominal damages is a prerequisite to and fairly subsumed by the broader question of whether a request for nominal damages prevent mootness.

has caused a change in behavior of § 1983 litigants. *See* Petition at p. 16-18. It is this change of behavior in response to *Buckhannon* that has forced courts to address whether nominal damages prevent mootness in the face of changed policy. The issue has spawned a deep circuit split and petitioners urge the Court to grant their petition to resolve the split.

CONCLUSION

Petitioners respectfully ask this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

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April 5, 2011

APPENDIX B

Decision of the U.S. District Court for the Northern District of New York (June 13, 2005) (Transcript of Proceedings containing decision.) 1b

Decision of the U.S. District Court for the Northern District of New York (February 6, 2007) 13b

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

COLLEGE STANDARD MAGAZINE, *et al.*

Plaintiff, 03-CV-505

-versus- **(Decision)**

STATE UNIVERSITY OF NEW YORK AT ALBANY, *et al.*,

Defendant.

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, New York, 12207, on MONDAY, JUNE 13, 2005, before the HON. THOMAS J. McAVOY, United States District Court Judge.

APPEARANCES:

FOR THE PLAINTIFF:

OLIVER, OLIVER LAW FIRM [sic]
BY: LEWIS B. OLIVER, ESQ.

FOR THE DEFENDANT:

BY: THOMAS MARCELLE, ESQ. [sic]

THE CLERK: College Standard Magazine, et al. versus Student Association of the State University of New York at Albany, 2003-cv-505.

May I have the appearance for the Plaintiff please.

MR. OLIVER: Lewis B. Oliver for the plaintiff, your Honor.

Mr. MARCELLE: I'm sorry, I think that's a mistake.

THE COURT: You are for the defendant.

MR. OLIVER: Oh, for the defendants.

THE COURT: I know you are used to representing the plaintiffs.

MR. MARCELLE: Tom Marcelle of Albany for the plaintiffs.

THE COURT: Mr. Marcelle, is that your daughter back there?

MR. MARCELLE: Yes, your honor.

THE COURT: Is she going to prompt you?

MR. MARCELLE: She inherited a lot of her mother's Sicilian flavor.

(Oral argument heard.)

(Bench decision rendered):

THE COURT: No, I'm satisfied. I think you both presented the case very well, completely, even over completely in some cases, but enough to give me an indication of what you were arguing and what the different viewpoints are. And that's appreciated by the Court.

The plaintiffs, individuals representing a group of students at SUNY Albany, commenced the instance action a challenging defendants' decision to deny funding to their group, the college Standard Magazine. Plaintiffs contend that the denial of funding was content based, in violation of the First Amendment.

Briefly stated, the relevant facts are as follows: College Standard Magazine is a recognized student organization. The student association is an unincorporated association that, as is pertinent hereto, received its funding from a mandatory student activity fee. Subject to criteria set forth in New York State regulations and final oversight and approval by the university, the student association made decisions on how to allocate funding to the various student organizations seeking funding. College standard Magazine did not apply for funding as a line item in the 2002-2003 budget for the 2002-2003 academic year. Instead, in September of 2003, it applied for funding as a new start-up group. The student association's financial arm proposed a bill to fund plaintiffs in the amount of $350. Various persons on the student association central council,

the legislative arm of the student association, voiced objection to funding the College Standard Magazine. Some of the objections were because of its salacious articles, it's particular view of conservatism, and because of its claimed obnoxious articles. There also is some evidence in the record that members of the central council may have stated that there was not a need for conservative voice on campus. After much debate, the central counsel [sic] voted 14 to 6 to deny funding to plaintiffs.

Plaintiffs commenced this action claiming that Defendants conduct violated their First Amendment rights. The defendant student association claims it is not a state actor, and thus, is not subject to liability for claimed First Amendment violations. The student association previously moved to dismiss the claims against it on this very ground. The Court previously ruled that the student association acts under color of state law for purposes of 42 U.S. Code Section 1983.

So, respectfully, Mr. Oliver, I will have to say that that is the law of the case.

But even so, whether the student association acts under color of state law is not all that clear cut. However, in light of the facts that the student association is funded by a mandatory student activity fee, the University collects the fee at registration, the payment of the fee is enforced by the University, the student association is empowered to deny participation in student activities to any student who does not pay the fee, state regulations govern the preparation of budgets for expenditure of the fees, the student association has broad discretion to disburse the funds, the university retains

oversight over such budget and the disbursement of funds, state regulations govern the use of the funds and, importantly, the university retrains, quote, final determination for approval of compliance with 8 New York Code rules and Regulations Section 302.13 of any fiscal commitment, close quote, and for the reasons stated in the Court's prior ruling, the student association can fairly be found to be acting under color of state law. That conclusion is further supported by the student association's contention that it received advice and counsel from the University concerning how to make funding determination. Specifically, the student association claims that it met with University officials who explained the need t make funding decisions in a content neutral manner. Moreover, the strong ties between the University and the funding of groups through the student association as discussed in *Carroll v. Blinken*, 957 F.2d 997, also support a finding of state action.

The student association also again raises the Eleventh Amendment immunity which was previously found not to apply. There may be facts suggesting the student association is an arm of the state and, therefore, entitled to Eleventh Amendment immunity. If such facts exist, they have not been presented to the Court for review. The student association contends that because SUNY is an arm of the state that it is entitled to Eleventh Amendment immunity, then it too is entitled to immunity. However, the student's association makes the factual leap that it is an arm of the University. There is no evidence in the record to this effect. The only evidence concerning the creation and status of the student association is that a – is that it is a

voluntary, unincorporated association. There's no evidence that it was created by the state or by the University or that it was otherwise an arm of the state.

Accordingly, on the facts presented, there is no Eleventh Amendment immunity.

With respect to the issues of legislative and qualified immunity, the Court adheres to its prior rulings. Legislative immunity and qualified immunity apply only to individuals. There being no individual defendants, there can be no legislative or qualified immunity.

Have disposed of the students' association's defenses, the Court will now address the merits of the First Amend claims.

The governing principles here is that of viewpoint neutrality in the allocation of funding support. *Board of Regents of University of Wisconsin v. Southworth*, 120 Supreme Court 1346. As the Supreme Court stated in *Southworth*, quote, when a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others, close quote. *Southworth*, at 1356.

In this suite, plaintiffs are not challenging the New York State regulations governing the mandatory student activity fee. Rather, they are challenging the manner in which the decision was made to deny them funding. It's their claim that the

decision was viewpoint based and, therefore, violated their First Amendment rights.

The student association admits that at all relevant times there were no policies regarding the funding process. It appears that they have since adopted policies, as mentioned by Mr. Oliver. Nevertheless, the student association contends that it was aware of *Southworth* at the time it made its funding decision concerning plaintiffs and that it acted in a viewpoint neutral way. The student association contends that it was aware of *Southworth* at the time it made its funding decision concerning plaintiffs and that it acted in a viewpoint neutral way. The student association contends that I denied funding based on considerations including whether the organization was active on the entire campus, whether it was accessible to a wide range of students, and whether it was a small group that might spend its allocation on a group party. The student association contends that it was its policy to consider how many active members the organization had. Plaintiffs, on the other hand, submitted an affidavit from a then-member of the central council, Eric Amidon, who denies that the central council ever discussed the *Southworth* decision before denying funding to plaintiffs. Amidon also recounts that it was the student association's belief that it was not bound by the *Southworth* decision. This state is supported by the affidavit of plaintiffs Star and Barea – how do you pronounce that –

MR. OLIVER: Barea.

THE COURT: -- Barea, who both claim that MacNamara stated that the student association was

not bound by *Southworth*. Amidon also stated that he voted against funding plaintiffs because of its salacious articles, its twisted views and conservatism, its aggressive style and because it gave conservatives a bad name. In his affidavit, Jamie McNamara stated that funding was denied, at least in part, because it was believed that the plaintiffs' publication was obnoxious and offensive and that he newspaper published by plaintiffs contained a few articles about political or conservative issues. Another central council member, Anton Konev, stated that he voted to deny funding to plaintiff because, quote, pride alliance, a gay student organization, has been to judicial affairs because of this newspaper. We have students against this newspaper already; that is why I would say we should save this money for someone who everybody thinks should get the money, close quote. McNamara also is purported to have stated that, quote, we don't need a conservative presence on campus, close quote. McNamara denies making any such statement.

Looking at this evidence in the light most favorable to plaintiffs, a fair-minded trier of fact could conclude that plaintiffs were denied funding because of the content of its publication. Statements concerning plaintiffs' views of conservatism, whether they give conservatives a bad name, whether their articles are obnoxious, whether there was enough support for the group, whether a conservative presence is needed on campus and whether everybody thinks the newspaper should get money could be found to be content based.

Another potential First Amendment liability is in the degree of discretion afforded the student

association in granting funds. See *Transportation Alternatives Incorporated v. City of New York*, 340 F.3d 72, at 77. That case noted that regulations may not delegate overly broad discretion to the decision makers. On the one hand, funding decisions must be made in accordance with applicable New York State regulations and approved by the University. On the other hand, defendants admit that there were no written policies governing their funding decisions. They contend, however, that there were unwritten policies in this regard. Plaintiffs, however, have submitted affidavits from student association members attesting to the lack of any such unwritten policies. Thus, there's a triable issue of fact whether defendants had unbridled discretion to restrict speech.

The defendants next argue that even if some members of the student association voted to deny funding to plaintiffs for impermissible reasons, there's no evidence that a majority of the members did so. In this case there were 21 members of the student association present to vote on funding plaintiffs. Fourteen voted against funding and six voted for funding. One abstained.

In Title VII discrimination cases it has been held that, quote, the impermissible bias of a single individual at any stage of the decision-making process may taint the ultimate decision in violation of the Title VII. This is true even absent evidence of illegitimate bias on the part of the ultimate decision maker so long as the individual shown to have the impermissible bias played a meaningful role in the decision-making process. *Bickerstaff v. Vassar College*, 196 F. 3d 435. It's not often I'm able to cite

my own decision on the Second Circuit level, but I have the pleasure of doing so today. Had to find a way to work it in.

This reasoning should equally apply to allegations of viewpoint discrimination and, thus, will be extended to the First Amendment analysis. See *Beck v. Hastings on Hudson Union Free School District*, 365 F.3d 107, at 125.

Here, there is evidence of at least three student association members who, as previously discussed, could be found to have voted to deny funding for impermissible reasons. One of these members, Jamie McNamara, was the chairman of the student association and, thus, could be found to played a prominent role in the association and in the voting. There's also evidence that there was much debate over whether to fund plaintiffs' publication. A fair-minded trier of fact could, therefore, reasonably conclude that one or more of these individuals tainted the minds of the other voting members ad, thus, the ultimate decision to deny funding. Although plaintiffs have an uphill battle in this regard, the Court cannot say that no fair-minded trier of fact could find in their favor. Accordingly, defendant's motion for summary judgment is denied.

Conversely, looking at the evidence in the light most favorable to defendants, a fair-minded trier of face could conclude that defendants had a justifiable non-content based reason for denying funding. The trier of fact could conclude, for example, that any viewpoint oriented statements or beliefs of certain student association members did not affect the vote.

Accordingly, plaintiffs' cross-motion for summary judgment is also denied.

For the foregoing reasons, the defendants' motion and plaintiffs' cross-motion for summary judgment are denied.

Defendants shall submit an order on notice to plaintiff within 11 days of today's date.

Thank you for your interesting argument. We'll have to save all that for a jury.

MR. OLIVER: Thank you, your Honor.

MR. MARCELLE: Thank you, your Honor.

THE COURT: Your [sic] welcome. Sorry I couldn't dispose of it one way or the other; just looking forward to having too much fun trying it.

(Court adjourned at 11:10 AM.)

CERTIFICATION'

I, BONNIE J. BUCKLEY, RPR, Official Court Reported in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings held in this matter and caused the same to be transcribed; that the foregoing is a true and correct transcript of the same and whole thereof.

s/ BONNIE J. BUCKLEY, RPR

BONNIE J. BUCKLEY, RPR

USDC Court Reporter – NDNY

DATED: AUGUST 29, 2005

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

COLLEGE STANDARD MAGAZINE, *et al.*

Plaintiffs,

v.

STATE UNIVERSITY OF NEW YORK AT ALBANY, *et al.*,

Defendant.

Case No. 1:03-CV-505

THOMAS J. McAVOY
Senior United States District Judge

ORDER

The parties have submitted a proposed order to the Court purporting to resolve what they believe to be a non-final judgment entered in this action on October 18, 2006. The apparent basis for the parties' belief is that, after noting that the Court found the student association's funding policy was unconstitutional, the Judgment continues to state, in part, that: "however, the Court did not reach a decision as to the remaining cause of action relating to the discriminatory voting practice." The Court did not need to address whether the voting scheme was

unconstitutional because it found that the process by which funding is allocated (including the voting scheme) was unconstitutional. Stated otherwise, the constitutionality of the voting process, which was a part of the funding process, was subsumed by the finding that the overall funding scheme was unconstitutional.

In light of any potential confusion regarding the language in the Judgment, the Court hereby grants the motion to amend the judgment and directs that the Judgment be amended as follows: (1) to reflect that the Plaintiff's motion for summary judgment was granted in accordance with the September 3, 2005 Order; not the July 9, 2005 Order; and (2) omitting the above-quoted language.

IT IS SO ORDERED

Dated: February 6, 2007

Thomas J. McAvoy
Thomas J. McAvoy
Senior, U.S. District Judge